AMERICAN CONSTITUTIONAL LAW:
AN E-COURSEBOOK

By

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VOLUME 1

THE STRUCTURAL CONSTITUTION: SEPARATION OF POWERS AND FEDERALISM

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VOLUME 2

INDIVIDUAL ECONOMIC, CIVIL AND POLITICAL RIGHTS IN THE CONSTITUTION EXCLUSIVE OF THE FIRST AMENDMENT

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NOTES ON E-COURSEBOOK

This E-Coursebook is divided into 3 Volumes, each covering 2 credits of material in a standard law school course. The two Volumes here are Volume 1: THE STRUCTURAL CONSTITUTION: SEPARATION OF POWERS AND FEDERALISM & Volume 2: INDIVIDUAL ECONOMIC, CIVIL AND POLITICAL RIGHTS IN THE CONSTITUTION EXCLUSIVE OF THE FIRST AMENDMENT. Volume 3 is entitled: THE FIRST AMENDMENT, and is available at: http://libguides.stcl.edu/kelsomaterials. Each Volume comprises 14 Chapters, with each Chapter representing material typically addressed in a 2-hour class session.

Within cases, case names are italicized when used in a sentence. All citations to cases, and citation references (such as “id.” or “see, e.g.”) are non-italicized. As is typical in Coursebooks, no indication is given when paragraphs have been excised from Court opinions. Relevant footnotes in cases are moved directly into the case text and indicated as such. Occasionally, “[Ed.:]” is used when material is added into a case reflecting a comment from the authors, not from the Court. The standard phrase now used at the end of Court opinions (“It is so ordered.”) typically is removed.
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* Chief Justice Rutledge returned to the Court after serving previously as an Associate Justice. Chief Justice Hughes returned to the Court after serving previously as an Associate Justice.

** Chief Justice White was confirmed as Chief Justice, moving from his existing position as an Associate Justice.

*** To prevent President Johnson from filling the position left by Justice Catron’s death in 1865, or filling any other vacancies that might occur, such as Justice Wayne’s death in 1867, Congress reduced the size of the Court from 10 Justices to 7 in 1866. In 1869, once Johnson was no longer President, Congress increased the size of the Court back to 9. In these moves, Justice Catron’s position 8 is typically viewed as removed; Justice Davis’ position 9 is renumbered as position 8, and filled by Justice Harlan on Davis’ death; Justice Field’s position 10 is renumbered as position 9. Justice Bradley’s appointment is typically viewed as recreating Wayne’s seat.

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** Chief Justice Stone was confirmed as Chief Justice, moving from his existing position as an Associate Justice. Chief Justice Rehnquist was confirmed as Chief Justice, moving from his existing position as an Associate Justice.

**** Justice Black replaced Justice Van Devanter at the end of that Term of the Court.

***** When Chief Justice Warren announced an intention to retire from the Court in 1968, President Johnson's nomination of Associate Justice Fortas to replace him was eventually withdrawn. President Nixon successfully nominated Judge Warren Burger. After his nomination to be Chief Justice failed, Justice Fortas retired in 1969, but his position was not filed by Judge Blackmun until 1970, following the failed nominations of Judge Clement Haynesworth and Judge G. Harrold Carswell. Justice Powell resigned at the end of the Court's Term in 1987, but Justice Kennedy was not confirmed until 1988, following the failed nominations of Judge Robert Bork and Judge Douglas Ginsburg.

****** Justice Scalia died on February 13, 2016. Judge Merrick Garland's nomination by President Obama was not considered by the Republican-controlled Senate.

******* Following the election of President Trump, his nomination of Judge Neil Gorsuch was confirmed by the Senate and he was sworn in on April 10, 2017.

****** Justice Kennedy resigned effective July 31, 2018. President Trump nominated Judge Brett Kavanaugh. After a 51-49 vote, he was sworn in on October 6, 2018.

The listing of “positions” of Supreme Court Justices used here is the standard account. The ordering of positions 1-6 in this Table conforms to the date when each of the initial Justices were confirmed by the Senate and thus received their commissions, consistent with the Judiciary Act of 1789, which provided that “the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.”
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III. Limitations on Quartering of soldiers in houses
IV. Protection against unreasonable search and seizure
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VI. Right to speedy and public trial, notice of charges, confrontation, compulsory process, and assistance of counsel
VII. Right to trial by jury in suits for over twenty dollars
VIII. No excessive bail or fines or cruel and unusual punishment
IX. Enumeration of rights does not deny or disparage others retained by the people
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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

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

ARTICLE I

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

Section 2. [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.

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

[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 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 with three Years after the first Meeting of the Congress of the United States.
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.

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

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

Section 3.  [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.

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

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

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

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

[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.

[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.
Section 4.  [1] The Times, Place 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.

[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.

Section 5.  [1] Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

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

[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.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, not to any other Place than that in which the two Houses shall be sitting.

Section 6.  [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.

[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.

Section 7.  [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.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the 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 third of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, but 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 become a Law, in like Manner as if he signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote, to Which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented 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.  
[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;

[2] To borrow money on the credit of the United States;

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

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

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

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

[7] To establish Post Offices and post Roads;

[8] 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;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

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

[13] To provide and maintain a Navy;

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

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

[16] 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;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cessation 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 Legislatures of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; – And

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

Section 9. [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.

[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.

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

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

[5] No Tax or Duty shall be laid on Articles exported from any State.
[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;

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

[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.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factor Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its 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 Controll of the Congress.

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

ARTICLE II

Section 1. [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:

[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 Office of Trust or Profit under the United States, shall be appointed an Elector.

[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 the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and
House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greater 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.

[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.

[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.

[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 said Office, the Same shall devolve on the Vice President, and the Congress may be Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, as stated Times, receive for his Services, a Compensation, which shall neither be increased 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.

[8] 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. [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 Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
[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 Courts of Law, or in the Heads of Departments.

[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.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executes, 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 Behavior, 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 the 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 a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [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 of the same overt Act, or on Confession in open Court.

[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 attained.

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

[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.

[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.

Section 3. [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 as well as of the Congress.

[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 the 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 of 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**

[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.

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

[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 by 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.

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,

George Washington – *President and Deputy from Virginia*

*Attest*, William Jackson – *Secretary*
New Hampshire
John Langdon  
Nicholas Gilman

Massachusetts
Nathaniel Gordan  
Rufus King

Connecticut
William Samue. Johnson  
Roger Sherman

New York
Alexander Hamilton

New Jersey
William Livingston  
William Paterson
David Brearly  
Jonathan Dayton

Pennsylvania
Benjamin Franklin  
Thomas Fitzsimons
Thomas Mifflin  
Jared Ingersoll
Robert Morris  
James Wilson
Gerge. Clymer  
Gouverneur Morris

Delaware
George Read  
Richard Bassett
Gunning Bedford,Jr.  
Jacob Broom
John Dickinson

Maryland
James McHenry  
Daniel Carroll
Daniel of St. Thomas Jenifer

Virginia
John Blair  
James Madison, Jr.

North Carolina
William Blount  
Hugh Williamson
Richard Dobbs Spaight

South Carolina
John Rutledge  
Charles Pickney
Charles Cotesworth Pinckney  
Pierce Butler

Georgia
William Few  
Abraham Baldwin
ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF
THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED
BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH
ARTICLE OF THE ORIGINAL CONSTITUTION

Amendment I [1791]

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

Amendment II [1791]

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 [1791]

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

Amendment IV [1791]

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 of things to be seized.

Amendment V [1791]

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 offense 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 [1791]

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 [1791]

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

Amendment VIII [1791]

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

Amendment IX [1791]

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

Amendment X [1791]

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 [1798]

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 [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all person voted for as President, and of all person 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 of 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 [1865]

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 [1868]

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

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

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be 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 [1870]

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 [1913]

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

Amendment XVII [1913]

[1] 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.

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

[3] This amendment shall not be construed as to affect the election or term of any Senator chosen before it become valid as part of the Constitution.

Amendment XVIII [1919]

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

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

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

Amendment XIX [1920]

[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 sex.

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

Amendment XX [1933]

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

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

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

    Section 4. The Congress may be 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 form whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

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

Amendment XXI [1933]

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

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

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

Amendment XXII [1951]

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

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

Amendment XXIII [1961]

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

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

Amendment XXIV [1964]

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 or other tax.

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

Amendment XXV [1967]

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

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

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

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may be 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 of Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may be 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 [1971]

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

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

Amendment XXVII [1992]

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

RELATED DOCUMENTS

THE DECLARATION OF INDEPENDENCE (1776): “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”

THE ARTICLES OF CONFEDERATION (1781): “To all whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting. Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Article I. The Stile of this Confederacy shall be “The United States of America.” Article II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

THE CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA (1861): “We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessing of liberty to ourselves and our posterity – invoking the favor and guidance of Almighty God – do ordain and establish this Constitution for the Confederate States of America.”

Full text for all three documents is available, among other places, at: www.usconstitution.net
PART I: THE FEDERAL JUDICIAL DEPARTMENT

CHAPTER 1: JUDICIAL REVIEW IN AMERICAN CONSTITUTIONAL LAW

§ 1.1 Introduction to Constitutional Law Decisionmaking .........................35

§ 1.2 Political and Legal Background for *Marbury v. Madison* .....................50

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§ 1.1 Introduction to Constitutional Law Decisionmaking

1. Judicial Decisionmaking Styles

Constitutional law in the United States is understood and studied today primarily in terms of interpretations and applications of the United States Constitution by the United States Supreme Court. Other government officials and lower courts make initial determinations on constitutionality. But the final and authoritative say is that of the Supreme Court when deciding cases that involve judicial review of the constitutionality of governmental action. For this reason, the study of constitutional law is centered upon the study of leading cases decided by a majority of Justices on the Supreme Court.

In deciding these cases, different Justices have adopted different styles of interpretation to resolve the issues presented in the cases. The fundamental theme of this Coursebook is that four basic styles of interpretation have characterized the approach of Supreme Court Justices to the interpretation and application of the Constitution during five basic eras of constitutional interpretation. The four styles of interpretation are natural law, formalism, Holmesian, and instrumentalism. The five eras are represented in Table 1:

<table>
<thead>
<tr>
<th>Styles of Interpretation</th>
<th>Years Adopted by Controlling Votes on the Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Natural Law</td>
<td>1789-1873</td>
</tr>
<tr>
<td>Formalism</td>
<td>1873-1937</td>
</tr>
<tr>
<td>Holmesian</td>
<td>1937-1954</td>
</tr>
<tr>
<td>Instrumentalism</td>
<td>1954-1986</td>
</tr>
<tr>
<td>Modern Natural Law</td>
<td>1986-Today</td>
</tr>
</tbody>
</table>

Table 1
Eras of United States Constitutional Interpretation

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The foundation for the four styles of interpretation are judicial views on the nature of law (analytic or functional) and on the role of court (positivist or normative). Concerning the nature of law, two main approaches have appeared in jurisprudential writings. These two approaches differ over whether law should be judged primarily in terms of its success in developing a set of logically consistent, universal rules. Under one approach, law is seen as a primarily a set of rules and principles whose application is guided by an analytic methodology of logic and reason. This has been called the analytic, or conceptualist, approach. Alternatively, law can be seen as ultimately to be judged not in terms of logical consistency, but as a means to some social end through a pragmatic or functional treatment of rules and principles. This has been called the functional, or pragmatic, approach. A similar discussion of the difference between an analytic and functional approach is as follows:

[The functional approach] views law not as a set of general axioms or conceptions from which legal personnel may formally derive particular decisions [the analytic approach], but as a body of practical tools for serving substantive goals. Second, [the functional approach] conceives law not as an autonomous and self-sufficient system [the analytic approach], but as merely a means to achieve external goals that are derived from sources outside the law, including the dictates of democratic processes and the “policy sciences.” Third, [the functional approach] assumes that a particular use of law cannot be a self-justifying “end in itself.” Uses of law can be justified only by reference to whatever values they fulfill. Finally, the law is considered to serve generally instrumental values rather than intrinsic ones. That is, law’s function is to satisfy democratically expressed wants and interests, whatever they may be (within constitutional limits).

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1 See generally Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949, 955 (1988) (“[L]egal ordering [under an analytic approach] is not the collective pursuit of a desirable purpose. Instead, it is the specification of the norms and principles immanent to juridically intelligible relationships.”).

2 Id. at 964-65 (“The dominant tendency today [under a functional approach] is to look upon the content of law from the standpoint of some external ideal that the law is to enforce or make authoritative. Implicit in contemporary scholarship is the idea that the law embodies or should embody some goal (e.g., wealth maximization, market deterrence, liberty, utility, solidarity) that can be specified apart from law and can serve as the standard by which law is to be assessed. Thus law is regarded as an instrument for forwarding some independently desirable purpose given to it from the outside.”). See generally Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 840 (1935) (“If the functionalists are correct, the meaning of a definition is found in its consequences.”).

Concerning the nature of the judicial task, any judge must ask whether judicial decisionmaking should be separable from morals or social values, *i.e.*, should judges view law solely as a body of rules and principles from which legal conclusions are derived -- the positivist assumption -- or should judges view law as a body of rules and principles testable by reference to some external standard of rightness, some social or moral value -- law as normative or prescriptive, not descriptive. On the one hand, a judge could aim at producing decisions and opinions that are "good law" in the narrow sense of being clear, certain, and predictable, and unquestionably within the legitimate power of the court. Such judges are typically described as following a "positivist" approach to judicial decisionmaking. As has been noted: "If one has a positivist view of legal identification, pursuant to which items of law can be 'recognized' without satisfying a moral standard, . . . then one whose job partly involves law application could do that part of the job without having to engage in any moral reasoning whatsoever. . . . As a result, positivist judges, were they so inclined, could in some systems get away with an amoral conception of their task . . . ."\(^4\)

In contrast, a judge could aim at producing law and applications of law that accord with certain moral principles embedded in the society's legal and moral culture. Judges adopting this more "normative" perspective view the judge's role as requiring the judge to give some weight to the moral insights and traditions that lie behind legal rules and that may develop over time. As Professor Ronald Dworkin has noted, "[W]hat an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions."\(^5\)

Given these considerations, the four styles can be summarized as follows: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); and natural law (analytic normative). These relationships are represented in Table 2:

<table>
<thead>
<tr>
<th>Nature of Judicial Task</th>
<th>Positivism:</th>
<th>Normativism:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges as Neutral</td>
<td>Declarers of the Law</td>
<td>Judges as Normative Actors</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Nature of Law</th>
<th>Law as Logical; Analytic or Conceptualist Attitude</th>
<th>Formalism/Analytic Positivism</th>
<th>Natural Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law as Means to Ends; Functional or Pragmatic Approach</td>
<td>Holmesian/Functional Positivism</td>
<td>Instrumentalism</td>
<td></td>
</tr>
</tbody>
</table>


As noted, the positivist view is that judges may only discover, declare, and apply the law as it already exists. For analytic positivists (formalists), only the logic of existing concepts controls; for functional positivists (Holmesians), both the logic and purpose of existing concepts control, as functional jurists are sensitive to the purposes of legal rules as part of their pragmatic means-end reasoning. The final cause or end of the judicial task for positivists is whether the law is traceable to an authoritative source. Any departure from this view represents for positivists a form of illegitimate law-making.

In contrast to the positivist view, the judicial task for judges who adopt the normative view includes background norms that infuse existing common-law, statutory, and constitutional enactments. The normative view is that judges have the power to make law based on these norms, and regularly do so, covertly as well as overtly. For analytic normative theorists (natural law), these background norms are limited to logical elaboration of background moral principles; for functional normative theorists (instrumentalists), these background norms can include both principles and policies.

Professor Ronald Dworkin has noted a difference between arguments of principle and arguments of policy. He has stated:

I call a “policy” . . . a statement that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. . . . I call a “principle” a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong is a principle.6

In terms of what kinds of background considerations judges may use to resolve “hard cases,” the functional instrumentalist approach is willing to consider both arguments of principle and arguments of policy, with an emphasis on functional consideration of social policy calculations. In contrast, under a natural law theory, judges in considering background considerations should limit themselves to reasoned, or analytic, balancing of moral principles.

A short-hand reference for the major differences among the four interpretation styles is the following: formalist judges tend to emphasize the logical or literal elaboration of existing legal categories; Holmesian judges add to this focus a functional emphasis on deference to legislative and executive action, which typically reflects the purposes intended to be advanced by the existing legal categories; natural law judges add to this positivist focus on the logic and purpose of existing legal categories a normative emphasis on just evolution of the law through considering background moral principles embedded in the law and reasoned elaboration of judicial precedents; instrumentalist judges add to this more analytic just evolution of the law an emphasis on functional case-by-case consideration of social policies embedded in the law, which become particularly relevant when existing legal categories yield indeterminate results.

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These differences can be summarized in a more detailed version of Table 2:

**Table 2A**  
*More Detailed Version of Table 2: Styles of Judicial Decisionmaking*

<table>
<thead>
<tr>
<th>Nature of the Judicial Task</th>
<th>Judicial Decisionmaking</th>
<th>Emphasis of Judicial Decisionmaking</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Positivism: Judge as Neutral Declarer of the Law</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nature of Law</td>
<td>Formalism/Analytic Positivism</td>
<td>Logic; Analogy; Symmetry</td>
</tr>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Library Science</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science</td>
<td>Holmesian/Functional Positivism</td>
<td>All of the Above Plus Purpose; History of a Rule; Convenience</td>
</tr>
</tbody>
</table>

| Normative: Judge as Normative Actor | | |
| Nature of Law | Natural Law | All of the Above Plus Background |
| Law as Logical; Analytic or Conceptualist Attitude | | Moral Principles; Customary Norms; Justice |
| Law as Library Science | | |
| Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science | Instrumentalism | All of the Above Plus Background |
| | | Social Policies; Social Welfare; Social Conscience |

For further discussion of these four decisionmaking styles, see Charles D. Kelso & R. Randall Kelso, *The Path of Constitutional Law* Ch. 2, 3 (2007) (E-Treatise on the Constitution) (available at [http://libguides.stcl.edu/kelsomaterials](http://libguides.stcl.edu/kelsomaterials)).

### 2. United States Supreme Court Decisionmaking Styles

With regard to United States Supreme Court decisionmaking, there is a gradual transformation today from precedents and law designed by Justices who adhered to one style of constitutional interpretation—the instrumentalist, policy-driven, perspective that flourished on the Supreme Court in the 1960s, and predominated generally on the Court from 1954-86 — to law designed by a contemporary group of non-instrumentalist Justices.

In contrast to the instrumentalist approach, popular usage is that a non-instrumentalist judge rejects policy-driven judicial activism and will not legislate from the bench. Instead, the judge adheres to a policy of “strict construction” of the “plain meaning of text” consistent with the “original intent”
of a doctrine’s framers and ratifiers. A more precise formulation would note that there are three different concepts used in the preceding sentence – plain meaning of text, strict construction, and original intent – and thus at least three different kinds of non-instrumentalist judges.\footnote{See, e.g., Morell E. Mullins, Sr., \textit{Coming to Terms with Strict and Liberal Construction}, 64 Alb. L. Rev. 9 (2000) (contrasting “strict construction”; “plain meaning”; and “original intent”).}

One kind of non-instrumentalist judge focuses on a doctrine’s text, whether in terms of the literal text of prior judicial decisions for common-law decisionmaking, the plain meaning of a statute for statutory construction, or the plain meaning of the text of the Constitution for constitutional interpretation. Since the text of the Constitution does not change absent formal constitutional amendment, this “textualist” approach concludes that the meaning of any provision is fixed at the time of ratification. Because the meaning is “fixed,” or as is sometimes stated “static,” the term “originalism” has also been used to describe this approach. However, since this approach does not likely reflect the “original intent” of the framers and ratifiers, the term “originalism” is not used in this Coursebook to describe this approach. The approach has also been called a “formalist” or “textualist” approach, and was most popular on the Supreme Court from 1873-1937. The term “formalism” is used in this Coursebook, not “textualism,” since each approach to constitutional interpretation starts with the constitutional text, and thus is “textualist” to that extent. The various approaches differ on what sources in addition to “text” are used to complete the process of constitutional interpretation, and how much weight to give those sources. In his 1997 book, \textit{A Matter of Interpretation}, Justice Scalia has embraced the term “formalism” when noting, “Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ This answer to that is, \textit{of course it’s formalistic!} The rule of law is \textit{about} form. . . . Long live formalism. It is what makes a government a government of laws and not of men.”\footnote{\textit{ANTONIN SCALIA, A MATTER OF INTERPRETATION} 25 (1997).}

A second kind of non-instrumentalist judge focuses on “strict construction” of doctrine. With respect to the Constitution, the emphasis of “strict construction” is on a presumption of constitutionality given to legislative and executive actions, and thus deference to such legislative and executive actions, as they reflect society’s “dominant forces.” A judge following this approach will find governmental action unconstitutional only if the action is clearly unconstitutional. In this Coursebook, this approach is called a Holmesian approach, after Justice Oliver Wendell Holmes, Jr., who popularized this approach while on the Supreme Court from 1902-32. This approach is also associated with Professor James Bradley Thayer, and his view that courts should defer to governmental action out of respect for the other branches of government, unless the unconstitutionality of the governmental action is “so clear that it is not open to rational question.”\footnote{James B. Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, 7 Harv. L. Rev. 129, 144 (1893). On Thayer's views generally, \textit{see Symposium: One Hundred Years of Judicial Review: The Thayer Centennial Symposium}, 88 Nw. U.L. Rev. 1-468 (1993).} This approach was most popular among a majority of Supreme Court Justices from 1937-54. The Holmesian approach is a “strict construction” approach only for cases involving individual rights.
challenges to the constitutionality of governmental action. For structural issues of federalism or separation of powers, the Holmesian deference-to-government approach does not call for “strict construction” of governmental powers, but rather for deference to governmental powers.

A third kind of non-instrumentalist judge focuses attention on the “original intent” of a doctrine’s framers and ratifiers, and therefore asks in the context of the constitutional law how the framers and ratifiers would have gone about interpreting the provision in question. In this Coursebook, this approach is called a natural law approach to interpretation, since the Constitution’s framers and ratifiers, at least from the Constitution’s drafting through the Civil War Amendments, were guided by 18th- and 19th-century theories of natural law. It has been noted:

Beginning in the 1760's, Americans separated ideas about the principles of government from the product of its actions; the law. They did so by tying the idea of a written constitution to two related notions, natural law and social contract. . . . Natural law theory and the social contract gave American public law its emphasis on limiting governmental power. If government violated the social contract and if it denied natural rights and abused public trust, the people retained a right to overthrow it.10

Under this approach, which predominated on the Supreme Court from 1789-1873, and is reflected in Chief Justice John Marshall’s approach from 1801-35, a judge follows principles associated with reasoned elaboration of the law, giving due weight to constitutional text, purpose, structure, and history contemporaneous with the drafting and ratifying of the Constitution, including the framers’ belief in certain natural law principles like the “inalienable rights to life, liberty, and the pursuit of happiness” mentioned in the Declaration of Independence, or the 5th Amendment’s due process protections for “life, liberty, and property,” as well as to the subsequent events of legislative, executive, and social practice and judicial precedents. As discussed at § 5.2.nn.26-29, legislative, executive, and social practice, as well as judicial precedents, were critical to Chief Justice Marshall in the foundational 1819 case of *McCulloch v. Maryland*, as well as relevant to why President James Madison signed the bill creating the Second National Bank of the United States, at issue in the case.

Since Justice Thurgood Marshall’s retirement from the Supreme Court in 1991, there have been no Justices on the Court who have embodied the robust instrumentalist approach of Chief Justice Earl Warren, and Justices William Douglas, William Brennan, Abe Fortas, and Thurgood Marshall of the Warren Court of the 1960s. To a lesser extent, however, a more moderate instrumentalist approach survived on the Court in the personages of Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer. At least since 1986, however, a majority of Justices have not adopted an instrumentalist perspective on constitutional interpretation.

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Instead, the other Justices on the Court have opted for one of the non-instrumentalist approaches. Chief Justice William Rehnquist usually adhered to Justice Holmes’ philosophy of giving great deference to legislative and executive actions. Justices Antonin Scalia and Clarence Thomas have usually applied an interpretation theory characteristic of a formalist approach. This led them often to join with Chief Justice Rehnquist, but not always.\textsuperscript{11} After 1991, the typical swing votes on the Court were held by Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter. They usually adhered to a natural law style of interpretation, although each sometimes adopted a different style: Kennedy, formalist; O’Connor, Holmesian; and Souter, instrumentalist.

Constitutional law today reflects the clash and accommodation of these four interpretation styles. As stated above in Table 1, each of these interpretation styles was adopted by a majority of Justices at some earlier time: natural law, 1789-1873; formalism, 1873-1937; Holmesian, 1937-54; and instrumentalism, 1954-86. None are adopted by a majority of Justices today, although each has had at least one adherent since 1972. This clash among the approaches is likely to continue in the near future. For Justices appointed since 2005, Chief Justice Roberts has tended to follow a Holmesian interpretation style similar to Chief Justice Rehnquist, whom he replaced. Justice Alito and Gorsuch have tended to follow a formalist style similar to Justices Scalia and Thomas, while having an occasional affinity for Holmesian deference. Justices Sotomayor and Kagan have tended to follow a liberal moderate instrumentalist style similar to Justices Ginsburg and Stevens. Given recent Court membership, the controlling swing vote on the Court from 2005-2018 was usually Justice Kennedy who, like Justices O’Connor and Souter, tended to follow a modern version of Chief Justice Marshall’s natural law style of interpretation. With Justice Kennedy’s retirement, effective July 31, 2018, the swing vote on the Court awaits confirmation of a new Supreme Court Justice.

That four styles of interpretation are in today’s Supreme Court opinions makes it more difficult to predict outcomes and underlying reasoning. However, there is some value in not having one dominant perspective. The University of Chicago’s distinguished scholar, the late Professor Richard McKeon, believed that with “every fundamental problem, be it scientific or humanistic, there are ‘alternative approaches which are in fruitful relation to each other.’ This applies to thinkers who were contemporaries – or centuries apart. McKeon demanded his students learn more than what Plato or Aristotle had said on a given subject. . . . ‘[H]e wanted them to understand how Plato would have handled Aristotle’s position, and how Aristotle would have handled Plato’s position.’”\textsuperscript{12}


Similarly, in this Coursebook an effort has been made to show how each of the four perspectives on judicial decisionmaking has handled the others by supporting its own premises and questioning the principles and applications of the other approaches. Because each of the four interpretation styles is reflected in some Justice’s approach today, the Justices engage in this process of questioning principles and contrasting premises on a daily basis, especially when there are concurring or dissenting opinions. However, their discussion usually focuses on justifying specific decisions that may be substantially influenced by particular facts. In contrast, this Coursebook takes the discussion to a higher level of abstraction, often by dealing with groups of cases on similar issues, so that general principles about the competing perspectives can emerge and be stated more clearly.

For more detailed discussion of these decisionmaking styles in the context of United States constitutional interpretation, see Charles D. Kelso & R. Randall Kelso, The Path of Constitutional Law Ch. 9-12 (2007) (Chapter 9: Formalism; Chapter 10: Holmesian; Chapter 11: Instrumentalism; Chapter 12: Natural Law) (available at http://libguides.stcl.edu/kelsomaterials).

As noted therein, and suggested above, most Justices are not purists in their interpretation style, having occasional affinities for a different style than their predominant style. This underscores that each of the two dichotomies, analytic/functional and positivist/normative, are opposite ends of a continuum along which any judge may fall. With that caveat, Table 3 attempts to give a sense of the approach of each Justice on the Court since 1968.

Table 3
Styles of Supreme Court Justices: Current and Recent Past: 1968 - 2018

<table>
<thead>
<tr>
<th>Nature of Judicial Task</th>
<th>Positivism: Judges as Neutral Declarers of the Law</th>
<th>Normativism: Judges as Normative Actors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature of Law</td>
<td>Law as Logical; Formalism</td>
<td>Natural Law</td>
</tr>
<tr>
<td></td>
<td>Analytic or Conceptualist</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Attitude; Law as Library Science</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Scalía; GORSUCH</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ALITO; Burger</td>
<td>Powell; Black; O'Connor</td>
</tr>
<tr>
<td></td>
<td>Blackmun; Harlan; ROBERTS; Rehnquist</td>
<td>BREYER; Black; BREYER</td>
</tr>
<tr>
<td></td>
<td>Law as Means to Ends; Functional Pragmatic</td>
<td>Instrumentalism</td>
</tr>
<tr>
<td></td>
<td>Approach; Law as Empirical Science</td>
<td>Warren; Brennan; Marshall</td>
</tr>
</tbody>
</table>

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3. Sources Used in Constitutional Law Interpretation

The sources of interpretation used by Supreme Court Justices to decide cases can be divided into two broad categories: contemporaneous sources and subsequent sources. Contemporaneous sources are those existing when the Constitution was framed, and thus contemporaneous to ratification. There are three kinds of such sources: text, context, and history. Regarding these sources, any interpreter must decide, among other things, how much weight to give arguments about the plain, literal meaning of the Constitution's text versus the text's purpose or spirit; the context of that text, including verbal maxims (normal rules of grammatical construction) or policy maxims (such as the “rule of lenity” to construe ambiguities in criminal statutes in favor of the defendant), related provisions in the Constitution or other related documents, like the earlier enacted Articles of Confederation, and structural arguments involving the structure of government contemplated by the framers and ratifiers, including theories of judicial review, federalism, separation of powers, and checks and balances; and historical evidence concerning the intent of the framers and ratifiers, both specific historical evidence (Notes of the Constitutional Convention or inferences from The Federalist Papers), particularly as related to specific historical intent about a particular provision, and general historical evidence (general background societal history), particularly as related to general concepts or principles in which the framers and ratifiers believed, rather than a focus on the specific historical intent about any particular provision. The difference between specific intent and general concepts is explored more fully at § 20.3 nn.43-46, when noting that a Justice faithful to the general concept of equality in the 14th Amendment could hold, as in Brown v. Board of Education, that racially segregated schools deny individuals equal protection of the laws, despite segregated schools being common in 1868, suggesting the framers did not specifically intend to abolish them.

Subsequent sources are those which came into being after the Constitution was framed and ratified. These sources involve legislative, executive, and social practice under the Constitution; judicial precedent interpreting the Constitution, both core holdings of precedent and general reasoning of judicial opinions; and prudential arguments concerning the consequences of a particular judicial decision, both from the perspective of text, context, history, practice, and precedent, and whether that decision would advance a particular background principle of justice or social policy that the judge believes is “embedded” in the Constitution or existing constitutional doctrine, or perhaps a principle of justice or social policy that is “not so embedded” in the Constitution or existing constitutional doctrine.

All of these sources can be organized by resort to whether they involve relatively specific and limited interpretive tasks, or resort to more general kinds of reasoning. Specific interpretive tasks – like those involving the plain meaning of text; verbal maxims; specific historical evidence, particularly involving specific historical practices; or the core holdings of precedent – are more capable of being applied through deductive logic. In contrast, more general interpretive tasks – like those involving determining purposes behind text; resort to background structural arguments; resort to general historical evidence; reasoned elaboration of the law based on reasoning of prior judicial opinions; or prudential consideration of background principles or policies embedded in the law – involve greater use of the inferential logic of inductive reasoning. Table 4 summarizes these sources, separating them into contemporaneous and subsequent, and specific versus general.
In theory, the formalist style of interpretation uses only contemporaneous sources of meaning because of its belief in a *static model* where constitutional meaning is fixed at the time of ratification. Among contemporaneous sources, the formalist style places greatest weight on the specific interpretive tasks, viewing general kinds of reasoning as entitled to lesser weight because such general reasoning does not yield as specific, certain answers as specific interpretive tasks. The formalist style is thus most comfortable with considering “general” arguments of purpose only if the provision’s “specific” literal meaning is ambiguous or absurd. Similarly, formalists typically reject use of legislative history to interpret provisions, since only text was adopted, not the easier-to-manipulate legislative history. While in theory formalists will not rely on subsequent sources, based on their *static constitution* model, in practice most formalists, if text is not determinative, will give weight to legislative or executive practice (our Nation’s history and traditions), noted at §§ 25.1 n.9 & 25.2, and weight to core holdings of precedent which are “settled law,” noted at § 2.4.6 n.79.

Holmesian jurists, with their functional focus on a doctrine’s purposes, are more willing to embrace general kinds of contemporaneous source reasoning, like arguments of purpose, than are formalist jurists. Given their *deference-to-government* posture, Holmesian jurists are the most willing to give great weight to arguments of legislative or executive practice, and are more willing than formalists to consider prudential arguments of judicial restraint. Because of their functional attitude, they are slightly more willing to follow the core holdings of precedents based upon “substantial reliance,” as noted at § 2.4.6 n.80-83. As positivists, however, Holmesian jurists tend to share with formalists a rejection of the more normative task of judicial reasoned elaboration of the law, and a rejection of judicial resort to background principles of justice or social policies to resolve leeways in the law.
The main differences between natural law and instrumentalist jurists are the natural law great respect for precedent and reasoned elaboration of law, grounded in judicial elaboration through reason of background moral principles embedded in the Constitution, and the instrumentalist greater focus on prudential considerations, which reflects a concern with achieving justice given what Professor Karl Llewellyn called the “situation-sense” of each case, and the instrumentalist willingness to consider background principles of social policy, a willingness rejected by the natural law focus on background principles of justice alone. These tendencies are reflected below in Table 5:

<table>
<thead>
<tr>
<th>Sources of Constitutional Meaning and Styles of Interpretation</th>
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<tbody>
<tr>
<td>Interpretation Style</td>
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<tr>
<td>Formalism</td>
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<tr>
<td>Text</td>
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<tr>
<td>Context</td>
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<tr>
<td>Related Provisions</td>
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<tr>
<td>History</td>
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<tr>
<td>Specific Historical Intent</td>
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<tr>
<td>General Historical Concepts</td>
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<tr>
<td>Subsequent Considerations</td>
</tr>
<tr>
<td>Holmesian Practice</td>
</tr>
<tr>
<td>Natural Law Precedent</td>
</tr>
<tr>
<td>Instrumentalism Prudent</td>
</tr>
</tbody>
</table>

For discussion of all these aspects of interpretation, see Charles D. Kelso & R. Randall Kelso, The Path of Constitutional Law Ch. 5, 6 (2007) (http://libguides.stcl.edu/kelsomaterials) (including § 6.2.1.2 on literal versus purposive interpretation and § 6.2.3.1 on use of legislative history). In his Constitutional Law coursebook, Dean Chemerinsky summarizes these approaches similarly. He calls “originalists” those who follow the static constitution model of interpretation [formalism], and he notes three variations focusing on “text”; “specific intent”; and “abstract intent [general concepts].” For those who use subsequent considerations, whom he calls “nonoriginalists,” he notes three variations: “tradition [legislative, executive and social practice of the Holmesians]”; “those who stress natural law principles [natural law]”; and those who emphasize “improving the processes of government, those who emphasize contemporary values [instrumentalism].”

13 Karl Llewellyn called this approach to judicial decisionmaking the “Grand Style,” which looks at the “situation-sense” of each case. Llewellyn noted: “[A]s overt marks of the Grand Style: “precedent” is carefully regarded, but if it does not make sense it is ordinarily re-explored; “policy” is explicitly inquired into; alleged “principle” must make for wisdom as well as for order if it is to qualify as such . . . [W]here the reason stops there stops the rule . . . in accordance with purpose and reason.” Karl Llewellyn, On the Current Recapture of the Grand Tradition, in Jurisprudence: Realism in Theory and Practice 215, 217 (1962).

4. The Structure of Law as Determined by Judges

Because of their different perspectives on the nature of law and the nature of the judicial task, the four styles of decisionmaking tend to have different predispositions on the nature of legal reasoning and the structure of legal doctrine. One difference that can be observed concerns whether legal reasoning tends to be predominantly deductive or inductive. Because of their focus on logical elaboration of existing legal categories, formalists tend to be deductive. Because of their focus on background social policies and social welfare, instrumentalists tend to be more inductive. Holmesians and natural law Justices fall somewhere in between. For all Justices, there is a tendency to reason deductively where the Constitution’s terms are relatively detailed and specific. For more general terms, like equal protection or due process, judicial elaboration tends to be more inductive.

The four judicial decisionmaking styles also differ on the four most important kinds of decisions that determine the form or shape of any legal doctrine. The first decision is whether doctrine should be phased in absolute, categorical terms or as a balancing test. Once that decision is made, the next decision is whether the test should be phrased in terms of elements to meet or factors to weigh. The third is whether the elements or factors should be phrased in the language of specific rules or of broader standards. The final decision is whether the rules or standards should be viewed as questions of law to be decided by a judge or questions of fact to be determined by the trier of facts.

Table 6 suggests how these decisions tend to be made by the various styles of decisionmaking:

<table>
<thead>
<tr>
<th>Styles of Decisionmaking</th>
<th>Predisposition in Legal Reasoning and the Form of Legal Doctrine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formalism</td>
<td>Deductive Categorical Elements Rules Law</td>
</tr>
<tr>
<td>Holmesian</td>
<td></td>
</tr>
<tr>
<td>Natural Law</td>
<td></td>
</tr>
<tr>
<td>Instrumentalism</td>
<td>Inductive Balancing Factors Standards Facts</td>
</tr>
</tbody>
</table>

As might be predicted, analytic approaches to law, like formalism and natural law, have a predisposition for as many categorical rules to be adopted as possible. In contrast, balancing developed based on the pragmatic, functional theories used by Holmesians and Instrumentalists, which predominated on the Supreme Court between 1937-1986. In modern times, the natural law judge’s great respect for these precedents, and willingness to consider background moral principles embedded in the law, has pushed natural law judges more in the direction of a willingness to accept balancing tests. Thus, despite adopting the same natural law style of interpretation, natural law judges today may reach different conclusions on the proper form or shape of doctrine than natural law judges in the past, based on today’s different landscape of precedents.15

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Regarding elements versus factors, formalists tend to prefer doctrine to be stated as elements to meet. Doctrines stated as elements are more likely to be capable of mechanical, logical, analytic application. In contrast, any weighing of factors is necessarily going to be an imprecise science. Instrumentalists, not surprisingly, tend to be receptive to doctrine stated as factors because most factor schemes permit judges to take into account through the weighing of factors full consideration of the social policies involved in the case.

As a positivist approach committed to following existing legal categories, most Holmesian judges are predisposed to favor doctrine phrased as more certain and predictable elements, except where the purposes behind the law are sufficiently complex that they can only be adequately reflected in a weighing of factors. The background moral principles of a society are likely to be similarly complex. Thus, although the analytic side of the natural law style would prefer doctrine to be stated more as elements to meet, the normative side of the natural law style, which is sensitive to the law’s purposes and to the background moral principles embedded in the law, counsels for some greater amount of doctrine to be phrased as factors than the formalist or Holmesian styles of interpretation.

Not surprisingly, given their focus on analytic, logical treatment of positive law, formalists have the greatest predisposition to frame doctrine as rules. Not surprisingly, instrumentalists, tend to have a preference for standards. Formalist Justice Scalia has led “the charge” on the Court for rules, while instrumentalist Justice Stevens has been “his most consistent, standard-bearing antagonist.” Justice Stevens often prefers multi-factored contextual analysis and opposes rule-based or categorical decisionmaking, while Justice Scalia has indicated his reluctance to employ balancing tests, factor analysis, particularly in the form of “totality of the circumstances” tests, and standards of “reasonableness.” He has indicated a preference for categorical rules of general applicability.

Because of their positivist desire for certainty in following existing legal doctrine, Holmesian judges tend to have a preference for doctrine to be phrased more in terms of rules, than standards. On the other hand, the concern that too great an adherence to rules might distort the underlying moral basis of the law pushes the natural law style somewhat in the direction of standards, rather than rules. The language of standards is often better at encapsulating some background moral principle embedded in the law, such as the restitution principle that “no person should be permitted to profit from his own wrong”; or the contract principle that “promises should be kept”; or the tort principle that “persons should behave reasonably under the circumstances.”

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The desire for certainty in existing legal categories typically has meant that formalists and Holmesian prefer legal doctrines to be phrased as issues of law for court resolution. Indeed, one of Holmes’ premises was that as standards of reasonable behavior became clear, judges should lay them down once and for all as per se rules of conduct. Justice Scalia has also pointed out a connection among balancing tests, factor analysis, and whether doctrine is phrased as an issue of fact or law. He has noted that where “an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he [or she] begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat – an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application.” In contrast, the instrumentalist style, with its emphasis on the social policies underlying a case, often prefers doctrine to be phrased as facts for the social sensibilities of the triers of fact to be determinative. For the natural law style, the analytic side of natural law pushes in the direction of the formalist predisposition, while the normative side pushes in the instrumentalist direction.

As with the other aspects of the form or shape of law, these observations reflect general judicial predispositions that can be overridden for other reasons with respect to any particular doctrine. For example, a conservative, law-and-order formalist may prefer a multi-factored “reasonableness” analysis instead of a categorical requirement of a “warrant and/or particularized cause”; a liberal instrumentalist may prefer categorical protection of some free speech right, rather than a free speech balancing approach. However, such observations regarding the possibility of judges departing for tactical conservative/liberal reasons from their general predisposition with respect to a particular doctrine do not upset the general predisposition of the judicial decisionmaking styles noted here.

Table 7 below summarizes some of the different predispositions of conservative versus liberal judges. As noted at § 8.1.1(E) n.30, on issues of federalism, conservative judges tend to prefer states’ rights, while liberal judges tend to favor exercises of federal power. As noted at § 9.1.1 n.14, on separation of powers issues, conservative judges tend to favor the executive, while liberal judges tend to favor the legislative branch. On individual rights, conservative judges tend to focus on the protection of economic rights, while liberal judges tend to support economic regulation, focusing on the protection of non-economic civil/political rights, as suggested by comparing the conservative formalist Court to the liberal instrumentalist Court at §§ 2.3.2 - 2.3.4. Each style of decisionmaking has conservative and liberal adherents. Justice Scalia is best viewed as a conservative formalist, while Justice Black was a liberal formalist; Chief Justice Rehnquist was a conservative Holmesian, while Justice White was a liberal Holmesian. However, in general, conservatives tend to favor tradition and the status quo, which more often suggests the static constitution model of formalism, or the Holmesian deference-to-government model, while liberals tend to favor instrumentalism, which authorizes judges prudentially to aid the unempowered in the progressive reform of society.


20 Scalia, supra note 16, at 1182.
Table 7

Conservative versus Liberal Predispositions

<table>
<thead>
<tr>
<th>Conserv.</th>
<th>Federalism</th>
<th>Separation of Powers</th>
<th>Individual Rights</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Formalism (static constitution)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Holmesian (deference to government)</td>
<td>States’ Rights</td>
<td>Executive Branch</td>
</tr>
<tr>
<td></td>
<td>Natural Law (reasoned elaboration)</td>
<td></td>
<td></td>
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<tr>
<td>Liberal</td>
<td>Instrumentalism (aid unempowered)</td>
<td>Federal Power</td>
<td>Legislative Branch</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Civil/Pol. Rights</td>
</tr>
</tbody>
</table>

For more detailed discussion on all these structure of law considerations as determined by judges, see CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW Ch. 4 (Table 6 considerations) & § 6.4 (Table 7 considerations) (2007) (http://libguides.stcl.edu/kelsomaterials).

§ 1.2 Political and Legal Background for Marbury v. Madison

Article III defines the nature of the federal judicial power. It has a number of provisions. First, Article III, § 1 includes a general grant of power: “The judicial power of the United States is granted to the Supreme Court and such inferior courts as Congress, from time to time, may establish.”

Second, Article III, § 2, cl. 1 provides that this power extends to all “Cases,” defined by subject matter or impact: (1) “arising under this Constitution, the Laws of the United States, and Treaties made”; (2) “affecting Ambassadors, other public Ministers and Consuls”; or (3) “admiralty and maritime Jurisdiction.” Article III, § 2, cl. 1 also extends federal judicial power to all “Controversies,” defined by parties, to which: (1) “the United States shall be a party”; or (2) between (a) “two or more States”; (b) “a State and Citizens of another State”; (c) “Citizens of different States”; (d) “Citizens of the same State claiming Lands under Grants of different States”; or (e) “a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

Third, Article III, § 2, cl. 2 provides that the Supreme Court has original jurisdiction over cases (1) “affecting Ambassadors, other public Ministers and Consuls,” and (2) “those in which a State shall be a Party.” In “all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

Commentators have sometimes proposed drawing distinctions between “cases” and “controversies.” This has included distinctions like “cases” involve civil and criminal actions, while “controversies” only involve civil actions; or “cases” involve judicial exposition of the law, while “controversies” merely require the judge to act as a neutral decisionmaker to resolve the case; or Congress cannot both limit lower federal court jurisdiction and Supreme Court jurisdiction over “cases” so as to give state courts the last word on such issues, but can exercise both powers over “controversies.”

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In contrast, the Supreme Court has never drawn any such distinction between the two terms. Similarly, the framers never drew any distinction in using the phrase “all the other Cases before mentioned” to refer to both “cases” and “controversies” in the “Exceptions” Clause of Article III, § 2, cl. 2, cited above. It is universally accepted that the Court’s appellate jurisdiction applies to all the disputes listed as “cases” or “controversies” in Article III, § 2, cl. 1, despite the “Exceptions” Clause only using the word “Cases” to describe them. Following that practice, this Coursebook will use the word “cases” to include all the disputes listed as “cases” or “controversies” in Article III.

In *Marbury v. Madison*, the Court made clear the distinction between original and appellate jurisdiction. The facts in *Marbury* are relatively simple. As summarized by Dean Chemerinsky:

> On February 27, 1801, less than a week before the end of [President] Adams’s term, Congress adopted the Organic Act of the District of Columbia, which authorized the President to appoint 42 justices of the peace. [Ed.: This was part of moving the Nation’s capitol from Philadelphia, where the government had sat from 1790-1800, to Washington, D.C., thus fulfilling the Compromise of 1790 where Southern politicians agreed to permit the federal government to take over state Revolutionary War debts in exchange for the Nation’s capitol being located in the South.] Adams announced his nominations on March 2, and on March 3, the day before Jefferson’s inauguration, the Senate confirmed the nominees. Immediately, Secretary of State (and Chief Justice) John Marshall signed the commissions for these individuals and dispatched his brother, James Marshall, to deliver them. A few commissions, including one for William Marbury, were not delivered before Jefferson’s inauguration. President Jefferson instructed his Secretary of State, James Madison, to withhold the undelivered commissions.

William Marbury filed suit in the United States Supreme Court seeking a writ of mandamus to compel Madison, as Secretary of State, to deliver the commission. A writ of mandamus is a petition to a court asking it to order a government officer to perform a duty. Marbury claimed that the Judiciary Act of 1789 authorized the Supreme Court to grant mandamus in a proceeding filed initially in the Supreme Court. Although Marbury’s petition was filed in December, 1801, the Supreme Court did not hear the case until 1803 because Congress, by statute, abolished the June and December 1802 Terms of the Supreme Court.22

As a historical matter, the Federalist-dominated Supreme Court, and the Jefferson Administration and its supporters who controlled a majority in the House and Senate, were at loggerheads on many issues at the time. Many Federalists were concerned about the possible “radicalism” of the new Jefferson Administration, particularly against the backdrop of Jefferson’s sympathy for the French Revolution, despite the associated “Terror.” The Federalists, who first came to national offices under George Washington and John Adams, wanted a strong national government. They favored

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22 Chemerinsky, supra note 14, at 1-2.
commercial and manufacturing interests by: (1) assuming State revolutionary war debts to improve the United States’ credit rating; (2) passing taxes and tariffs to pay the debts and protect infant domestic manufacturing industries, a majority in Northern states, from foreign competition, particularly from England and other European countries; and (3) chartering a national bank to stabilize the currency. They also created a set of federal courts and passed the Alien and Sedition Acts of 1798 which punished the defamation of government officials. The Jeffersonians arose to preserve state power in order to favor agriculture interests, by keeping tariffs low on their products for sale, and keeping the federal government out of regulating slavery. They also vigorously opposed the Alien and Sedition Acts, whose main purpose seemed to be to prosecute Jeffersonians criticizing the Adams Administration in the run-up to the 1800 presidential and congressional elections. In that election, the Jeffersonians won control of the presidency, both houses of Congress, and several state legislatures.  

Before they left office, the Adams Administration, in their final days, enacted the Judiciary Act of 1801, which created 6 new circuit courts, staffed by 16 new judgeships; eliminated the Justices’ duty to serve as circuit judges in lower federal courts and “ride circuit” by traveling to lower federal courts to help out in hearing cases; and reduced the size of the Court in the future from six to five, in order to limit opportunities by the Jefferson Administration to fill any later vacant Supreme Court positions. The Federalists also created the 42 Justices of the Peace positions at issue in Marbury, as noted above. Seventeen of the commissions, including one for William Marbury, were not delivered before Jefferson’s inauguration. President Jefferson ordered his Secretary of State, James Madison, not to deliver those commissions. Marbury and three others then filed suit in the Supreme Court, seeking a writ of mandamus ordering Madison to deliver the commission.

The Jefferson Administration repealed the Judiciary Act of 1801 in 1802. Both the requirement of “circuit riding” by the Justices and the repeal of the new circuit judgeships were challenged as unconstitutional in 1802, but no decision could be reached until 1803, as the Supreme Court Terms in 1802 were abolished by Congress through refusing to fund Court operations, probably to prevent the Court from ruling on these issues. The Justices during 1802 had to decide whether to begin “riding circuit” again, or risk impeachment if they did not. Eventually, given political realities, which involved increasing support for the Jefferson Administration, and increased Jeffersonian majorities in the House and Senate following the mid-term elections in 1802, the Court members did agree to “ride circuit” again. This duty, while burdensome in terms of travel, would not have compromised the ability of Justices to decide cases, as the Supreme Court’s docket in the early years was often less than 10 cases each Term.  

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23 Regarding the political history surrounding the 1800 election, see generally JOHN FERLING, ADAMS AND JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 (2004).

24 See William H. Rehnquist, John Marshall: Remarks of October 6, 2000, 43 Wm. & Mary L. Rev. 1549, 1549-50 (2002) (the Court decided 60 cases total during its first decade of existence). Despite abolishing the 1802 Term, Congress did provide for one Justice to hear procedural matters on one day in August, 1802. That August Term was held each year until Congress abolished it in
removing judges who had been appointed to the now-repealed judicial positions violated the life tenure provision of Article III – was rejected in *Stuart v. Laird*, decided one week after *Marbury*. In this climate, *Marbury* can be seen as a warning to Jefferson that attempts at radicalism would be met with at least some Supreme Court response in the form of constitutional judicial review.

At the time, the relevant provision of the Judiciary Act of 1789, § 13, provided:

> And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where the state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in cases herein specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts in admiralty and maritime jurisdiction, and 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 most natural reading of this statute, consistent with the context of the mandamus provision among the related provisions in § 13, would be that the Supreme Court’s mandamus power exists only as a part of the Court’s appellate jurisdiction. The first half of § 13 deals with the original jurisdiction of the Supreme Court for cases involving states, ambassadors, and other public ministers and consuls. The last part of § 13, where mandamus is mentioned, deals with appellate jurisdiction regarding circuit courts and state courts, and writs of prohibition to district courts in admiralty and maritime cases originally brought in district courts. Under this reading, Marbury’s attempt to bring a mandamus action originally in the Supreme Court should fail as a matter of statutory interpretation, unless the case could be viewed as involving an aspect of appellate jurisdiction.

Marbury’s attorney did note in the oral argument before the Supreme Court that perhaps the case did involve appellate jurisdiction, since the Court was reviewing Marbury’s appeal from the actions of a government official, James Madison, in refusing to deliver him his commission. Chief Justice Marshall rejected this characterization in *Marbury*, stating, “It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not

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25 5 U.S. (1 Cranch.) 299, 308 (1803).

26 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80-81 (1789).
create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate jurisdiction, but to original jurisdiction.\textsuperscript{27}

In his opinion in \textit{Marbury v. Madison}, Chief Justice Marshall avoided reading § 13 as authorizing mandamus only as a matter of appellate jurisdiction by citing only the language dealing with mandamus in the last part of § 13, without regard to its context in the entire provision. By focusing on the mandamus clause, Marshall could correctly state that \textit{Marbury} was a case where mandamus would be the appropriate remedy, and by reading the statute to authorize a petition for mandamus to be brought originally in the Supreme Court, Marshall created a conflict between § 13, so read, and the limited grant of original jurisdiction in Article III, § 2, cl. 2 of the Constitution to cases involving ambassadors, other public ministers and consuls, and states. By creating a constitutional issue, Marshall then used \textit{Marbury v. Madison} to establish the constitutional doctrine of judicial review.

Given this result, it has always been a matter of some speculation whether \textit{Marbury} was conceived by the Court as a vehicle to establish judicial review only after the case was filed, or whether from the very beginning the case was “set up” by Marbury to provide Chief Justice Marshall and the Court with an opportunity to use the case to establish the doctrine of judicial review. The case was filed by Marbury in December, 1801, over seven months after his commission was not delivered by Jefferson’s Secretary of State, James Madison. By this time, Marbury already had another government position in Maryland, due to his long-time friends in that state. Marbury could likely have filed his mandamus petition in the Circuit Court of the District of Columbia, and then appealed to the Supreme Court if met with an unfavorable ruling in that court. In theory, after \textit{Marbury v. Madison}, Marbury could have re-filed in that district court, which neither he, nor any of the other individuals denied their commissions, ever did. These facts all suggest that Marbury was not really interested in obtaining the justice of the peace position, but filed the case for other reasons. Indeed, Chief Justice Marshall seemed to acknowledge the possibility that the case could have been brought first in a lower federal court, when he stated in \textit{Marbury} that finding jurisdiction was not “necessary in a case such as this to enable the court to exercise its appellate jurisdiction."\textsuperscript{28}

The Court’s opinion in \textit{Marbury} is distinctive in at least three respects. First, Marshall used the first part of the opinion to scold the Jefferson Administration for wrongly refusing to deliver Marbury’s commission, even though normal judicial practice, once a Court determines it has no jurisdiction, is to refuse to comment on the merits of the case.\textsuperscript{29} This aspect of the opinion apparently infuriated

\begin{itemize}
\item\textsuperscript{27} Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 147-48 (1803) (attorney’s argument); \textit{id.} at 175-76 (Chief Justice Marshall’s response).
\item\textsuperscript{28} \textit{id.} at 176. Regarding these speculations about \textit{Marbury}, see generally Susan Low Bloch, \textit{The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?}, 18 Const. Comment. 607 (2001). The 25 individuals appointed by Adams whose commissions were delivered, along with 5 others appointed by Jefferson, filled 30 of the 42 seats originally authorized. \textit{id.} at 608 n.5.
\item\textsuperscript{29} See, \textit{e.g.}, Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 151-54 (1908).
\end{itemize}
Jefferson and his supporters, both on the ground that Jefferson believed, as for gifts or deeds, that delivery was essential for the commission to be valid, and on the grounds that this part of the decision was clearly obiter dicta.\textsuperscript{30} Indeed, one might well ask if delivery of the commissions was not essential to the commissions being valid, as the Court held in \textit{Marbury}, why did John Marshall, and his brother James, make such extraordinary efforts the night of March 3 to get as many commissions delivered as possible? Was it just an overabundance of caution, or at that time did they think delivery was essential for validity? Second, the normal judicial practice is to read statutes, if possible, to avoid constitutional problems. Instead, the Court reached out in \textit{Marbury} to create a constitutional problem.\textsuperscript{31} Finally, under contemporary standards of conflict of interest, Chief Justice Marshall should not have sat on the case, since it was his own behavior as Adams’ Secretary of State in failing to ensure delivery of Marbury’s commission that was at issue in the case.\textsuperscript{32}

All the above observations suggest it is often important to know the political and social context within which the decision is being made in order to understand fully the Court’s decision.

\textbf{§ 1.3 The Leading Case on Judicial Review: \textit{Marbury v. Madison}}

\textit{Marbury v. Madison}

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

Chief Justice MARSHALL delivered the opinion of the court.

1st. Has the applicant a right to the commission he demands?

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears the date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who has declined


\textsuperscript{31} See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (“ascertain [if] a construction . . . is fairly possible by which the [constitutional] question may be avoided.”).

to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

The act to establish the judicial courts of the United States authorizes the supreme court "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 secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial powers, and the tribunals in which they should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.
When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

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; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

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? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. 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 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.
Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution – would of its elf be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that "no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."
Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

A most remarkable thing about this opinion is how Justice Marshall diverted attention away from the major weak spot in his decision. A gap in the opinion was the assumption that if Congress enacts a law, having decided that it is not repugnant to the Constitution, the Court has been granted the authority to disagree with Congress and find that the law conflicts with the Constitution. Justice Marshall dealt with this issue only indirectly when, to support the proposition that courts are not bound by a legislative act that is void because repugnant to the Constitution, he said it is "emphatically the province and duty of the judicial department to say what the law is.” This
argument merely assumes that courts can find a law repugnant to the Constitution even though Congress has made a contrary judgment.

Professor William Winslow Crosskey contended in his massive 1953 treatise, Politics and the Constitution, that the framers intended to adopt a "tripartite theory" of judicial review. That theory contends that each branch of government is the judge of the constitutionality of its own powers. The tripartite theory, which was supported by Thomas Jefferson, was suggested as the only true basis for judicial review in 1825 by Justice Gibson, of the Pennsylvania Supreme Court, dissenting in Eaking v. Raub. Justice Gibson said:

In the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute its [the Constitution's] provisions, they are bound by it, in preference to any act of assembly to the contrary. But what I have in view in this inquiry, is, the supposed right of the judiciary, to interfere, in cases where the constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act.

Under this view, for a court to declare a law void, which has been enacted according to the forms prescribed in the Constitution, was to usurp legislative power. To affirm the right of judges to determine the existence of a collision between a law and the Constitution was to take for granted the very thing to be proved. Where laws are passed, the legislature must decide the constitutionality of its act. For his own part, Justice Gibson retracted this view in 1845, and, consistent with a natural law theory of interpretation, embraced judicial review based upon practice and precedent.

Chief Justice Marshall avoided a discussion of the tripartite or other theories of judicial power by finding in Marbury that Congress' grant of original jurisdiction to the Court in mandamus cases was repugnant to the Constitution and then focusing attention on why courts are not bound by such a law. On these points he could rely on the supremacy of the Constitution over other laws, a concern about legislative omnipotence, and Article VI's reference to laws made "in pursuance" of the Constitution.

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As a general matter, the fact that a majority of the framers and ratifiers may have been operating under a belief in natural law theory does not answer the question of whether they endorsed judicial review. As Professor Robert P. George has noted:

It is certainly true that believers in natural law consider positive law to be legitimate and binding to conscience only where it conforms to natural law and, as such, respects the natural rights of people subject to it. But natural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural justice and respects natural rights. . . .

[I]t is clear that authority to enforce the natural law may reasonably be vested primarily, or even virtually exclusively, with the legislature; or, alternatively, a significant measure of such authority may be granted to the judiciary as a check on legislative power. . . . And that is because questions of the existence and content of natural law and natural rights are, as a logical matter, independent of questions of institutional authority to give practical effect to natural law and to protect natural rights.37

Whether any particular society will adopt some form of judicial review is ultimately dependent upon the customs and traditions of that society. For societies like England and France, democratic revolutions against the authority of the King took place against a background of close connections between the King and the King’s courts. Thus, those democratic revolutions emphasized strongly the legislative supremacy of parliament, and rejected any concept of judicial review of the constitutionality of legislative acts. In the United States, however, the reality was different. In an article entitled The Origins of Judicial Review, a treatment of judicial review in America during the post-Revolutionary War and ratification era, Professors Saikrishna B. Prakash & John C. Yoo noted:

Written in the aftermath of the Revolution, the first state constitutions did not explicitly establish judicial review. . . . [W]hen the early state constitutions were drafted the “judiciary was not yet seen as guardian of the constitutional order.” Nonetheless, the state assemblies were not to be omnipotent. Some state constitutions expressly incorporated Montesquieu’s famous maxim that the executive, legislative, and judicial powers ought to be kept separate. Other constitutions created institutions devised to check the legislature. Pennsylvania and Vermont . . . each had a Council of Censors . . . . [New York had] a council of revision . . . .

At some point, however, these declarations and institutions came to be viewed as insufficient. . . . [A]s the instances where the state courts engaged in judicial review (or were perceived as having done so) accumulated and as fundamental changes occurred in American ideas of government and law, judicial review came to be generally understood as an important check on the legislature under a written, limited constitution with a separation of powers.

Judicial review responded to, and was consistent with, several historical trends, circumstances, and problems in American constitutional and political thought of this period. First was the generic problem of a newly hyperactive legislative power. . . . Some came to believe that another institution was necessary to check the legislative vortex.

Second, there was a need to prevent states from ignoring or frustrating national enactments, particularly treaties. The Continental Congress lacked any formal method to enforce state compliance with the Articles of Confederation, federal resolves, and treaties. Judicial review by state courts over state legislatures arose as . . . to check the legislature. . . .

Third, the concept of the separation of powers grew in importance . . . . The separation of powers was not simply a check on the executive, but a guard against arbitrary, centralized government power and a protection of liberty. To the extent that this more robust concept of the separation of powers took hold . . . , it is more likely that the Founders would have understood judicial review as a product of the separation of powers.

Finally, one cannot overestimate the significance of the written nature of . . . constitutions. Before written constitutions were adopted, it might have been difficult to determine whether a legislature was acting unconstitutionally – after all, there was no baseline text; with a written constitution, however, all could compare a statute with actual constitutional text.38

This history suggests that Chief Justice Marshall accurately reflected the views of the framers and ratifiers when he announced the principle of judicial review in Marbury v. Madison. Further examples of historical evidence supporting Marbury, including evidence of the framing and ratifying period, and of legislative and executive practice and judicial precedents after the Constitution was ratified, but prior to Marbury, appear in the aforementioned article, The Origins of Judicial Review, and also in Professor Randy Barnett’s article, The Original Meaning of Judicial Power.39

Despite this evidence, the specific result in Marbury could be defended under the tripartite theory since the statute in question dealt directly with the nature of the Supreme Court’s original jurisdiction, and even under the tripartite theory judges are the appropriate actors to resolve questions of judicial power. If Marbury had been vigorously challenged by the Jeffersonians, the Court could have retreated to the tripartite position. This could have been supported by viewing the language in Article VI regarding laws made “in pursuance” of the Constitution as referring only to whether the laws were passed “according to the procedures of” the Constitution, such as following


the bicameralism and presentment clauses of Article I, § 7, cl.2. As long as procedures were followed, under the tripartite theory the question of whether the substance of any legislative enactment was consistent with the Constitution would be determined by the legislative branch itself, not the courts.

An additional aspect of *Marbury* also deserves comment. Under a literal interpretation of Article III, there would perhaps be original jurisdiction for Marbury’s mandamus plea, since his case, brought against Madison as Secretary of State, did involve a case affecting a “public minister” of the United States. The related use of the language “Ambassadors, other public ministers or consuls, Justices of the Supreme Court, or other officials” in the Appointments Clause, Article II, § 2, cl. 2, suggests that Secretaries of Cabinet Departments are “public ministers” for purposes of that Clause, although perhaps “public ministers” in the Appointments Clause, like “consuls,” refers only to United States diplomats, and Cabinet Secretaries are covered by the “other officials” language. However, Marbury’s attorney did refer to Madison as a “public ministerial officer” in his oral argument before the Supreme Court, suggesting that such a characterization of Madison was viewed as plausible by Marbury’s attorney.40

This possible argument was not mentioned by the Court in *Marbury* because the purpose of granting original jurisdiction to cases involving “Ambassadors” and “other public Ministers and Consuls” in Article III relates to “foreign” ambassadors or public ministers who are serving in the United States in a diplomatic capacity, not United States officials. To encourage such foreigners to serve in the United States, they are given the protection of having their cases heard directly by the Supreme Court. This purpose emerges from the text of § 13 of the Judiciary Act of 1789 which, as cited above at § 1.2 n.26, defined such cases as involving “ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations.”

The “law of nations” refers to international law, and its rules regarding, among other things, diplomatic immunity. The reference to “domestic servants” indicates the provision includes all those persons serving as part of the country’s diplomatic mission. Section 13 states that cases brought against such diplomats must be brought in the Supreme Court, while giving such diplomats the option of suing either in district courts or the Supreme Court if the diplomat is the plaintiff. The contemporary version of § 13 makes this point clear, stating that the original jurisdiction of the Court extends to “actions or proceedings to which ambassadors, other public ministers, consuls, or vice-consuls of foreign states are parties.”41 This example, however, underscores the dangers of a literal approach to interpretation, and the wisdom of considering a provision’s purpose.

40 *Marbury*, 5 U.S. at 152.

§ 1.4 Evaluation of Judicial Review

Evaluating judicial review remains a relevant exercise because a contemporary judge who has doubts as to the legitimacy or social benefit of judicial review may be less inclined to invalidate a particular law or its application. Chief Justice Marshall’s use of purpose and structural arguments in *Marbury v. Madison*, combined with the force of practice and precedent, should have strong appeal to contemporary judges who, like Marshall, bring a natural law approach to the decision of cases. As Justice Kennedy noted in the context of justifying the Supreme Court’s intervention in the 2000 Presidential election in *Bush v. Gore*, “Sometimes you just have to step up to the plate.”

Professor Herbert Wechsler, a distinguished constitutional law scholar, stated, "Let me begin by saying that I have not the slightest doubt respecting the legitimacy of judicial review, whether the action called in question in a case which otherwise is proper for adjudication is legislative or executive, federal or state." A number of his contemporaries have agreed: “The grant of judicial power was to include the power, where necessary in the decision of cases, to disregard state or federal statutes found to be unconstitutional. Despite the curiously persisting myth of usurpation, the Convention's understanding on this point emerged from its records with singular clarity.”

The approach also has instrumentalist appeal because it gives the courts the wherewithal to protect individual liberty, free speech, political processes, minorities, and individual freedoms. It is thus consistent with liberal instrumentalist views regarding social policy. Professor Laurence Tribe has said that by debating our fundamental values and deepest differences in the shared language of constitutional rights and responsibilities, the possibility is created for persuasion and moral education in national life. Dean Jesse Choper has said that the Court can use its power to secure individual liberty by protecting individuals from overexpansive uses of governmental power.

From a social policy perspective, one negative aspect of judicial review on constitutional grounds is that it can produce long delays in learning whether a law is valid, and it is possible that certain cases may not be presented by the most able advocates. Also, the Supreme Court, a non-democratic body, may impede an enlightened democratic consensus, a matter that concerned President Lincoln, as discussed in this Coursebook at § 2.3.1 n.60.

42 Newsweek, *Cover Story: The Secret Vote That Made Bush President* (Sept. 9, 2001) (quoting a remark by Justice Kennedy in a meeting at the Supreme Court with Russian judges).


Furthermore, the Supreme Court has not always used its power wisely, as is indicated by cases such as *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Lochner v. New York*, and *Hammer v. Dagenhart*. Perhaps not surprisingly, each of these cases advanced the interests of dominant white propertied or corporate interests, the segment of society from which most Supreme Court Justices have typically been drawn. The possibility of judicial review may also result in Congress passing constitutional questions to the Court rather than giving the questions full consideration themselves.

These kinds of considerations have led a number of progressive theorists to become increasingly skeptical of judicial review, particularly given a Supreme Court majority since 1991 of 5 more conservative jurists, as indicated in a number of 5-4 opinions regarding states’ rights and federalism issues under the 10th and 11th Amendments, addressed in Chapter 8; cutting back on various forms of aggressive affirmative action, addressed in Chapter 21; and the 5-4 decision in *Bush v. Gore*, addressed in Chapter 24. Prominent among such commentators sharing this concern is Professor Mark Tushnet. Professor Tushnet has noted a number of alternative forms of judicial review to *Marbury*, and has proposed moving away from *Marbury*’s “court-centered” approach in favor of “populist” interpretation by citizens and elected government officials. Other progressive commentators have also focused on this problem, as have proponents of deliberative democracy.

With regard to judicial review, Holmesian jurist Dean John Hart Ely noted that judicial review can help create democracy by sustaining our political process in a variety of ways, such as removing

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47 *Dred Scott*, 60 U.S. (19 How.) 393 (1857) (in *dicta*, Missouri Compromise of 1820 limiting slavery to the South unconstitutional, among other flaws), excerpted at § 16.4.2; *Plessy*, 163 U.S. 537 (1896) (racial segregation of railroad cars not a violation of equal protection), excerpted at § 20.2; *Lochner*, 198 U.S. 45 (1905) (limit on baker’s working hours invalid as unreasonable restraint on liberty of contract), excerpted at § 17.2; *Dagenhart*, 247 U.S. 251 (1918) (Congress lacks the power to ban from interstate commerce products manufactured using child labor), excerpted at § 6.1.


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impediments to free speech, publication, and political association, and by striking down discrimination against certain classes of voters.\textsuperscript{51} However, given Holmesian deference, court review should be limited. As Justice Frankfurter, citing 19th-century Harvard Law School Professor Thayer, noted in \textit{West Virginia State Board of Education v. Barnette}: “Let [courts] consider how narrow is the function which the constitutions have conferred on them – the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work.”\textsuperscript{52} In the same case, Justice Frankfurter also cited a passage from Holmes, stating, “When Mr. Justice Holmes, speaking for this Court, wrote that ‘it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,’ . . . he went to the very essence of our constitutional system and the democratic conception of our society.”\textsuperscript{53} Professor Lino Graglia has similarly written that courts should not be public policy makers in society.\textsuperscript{54}

Formalist jurists should have a little more difficulty with the doctrine of judicial review, because the doctrine has no explicit grounding in literal constitutional text. Some formalist commentators have questioned \textit{Marbury} and what it says about judicial review. For example, Professor Michael Paulsen has stated that \textit{Marbury} does not stand for a robust theory of judicial review, and that to the extent it says anything about judicial review it mandates strict, textual construction of the Constitution. Professor Paulsen’s basic argument was that \textit{Marbury} stands for the tripartite theory of judicial review. Further, adopting a purist formalist theoretical position that rejects any use of subsequent sources, including precedent, on the grounds that the formalist \textit{static} constitution model should use only contemporaneous sources of interpretation, Professor Paulsen rejected the influence of 200 years of constitutional precedents since \textit{Marbury}. Professor Paulsen also stated that \textit{Marbury} implicitly supported a formalist, static, textualist model of constitutional interpretation.\textsuperscript{55}

As an historical matter it is difficult to claim that the framers and ratifiers predominantly believed in a formalist theory of interpretation. The 18th century was dominated by Enlightenment theories of natural law. Positivist theories, like formalism, only became more popular in the 19th century under the influence of Jeremy Bentham and John Austin in England. In any event, even if \textit{Marbury}


\textsuperscript{52} 319 U.S. 624, 669 (1943) (Frankfurter, J., dissenting), \textit{citing James Bradley Thayer, John Marshall} 104-10 (1901).

\textsuperscript{53} 319 U.S. at 649, \textit{citing Missouri, Kansas & Texas R. Co. v. May}, 194 U.S. 267, 270 (1904).


could be read in the narrower sense of supporting a tripartite theory of judicial review, under a
natural law theory of interpretation, the 200 years of legislative, executive, and social practice and
judicial precedent supporting the broader reading of Marbury fix the broader theory as authoritative
today. This would be true under the natural law theory of interpretation even if one believes, likely
erroneously, that Professor Paulsen, as opposed to Professors Prahesh and Yoo, has a better sense
of what text, context, and history reveal about judicial review and the 1803 decision in Marbury.56

Given our Nation’s history, our traditions have been more in favor of judicial review, although
occasional attempts to limit, or alter, judicial review have been made, such as Senator Robert La
Follette’s proposal in 1922 to let 2/3 of both Houses of Congress overrule Supreme Court decisions
invalidating federal statutes, or numerous proposals both before and after the Civil War to require
supra-majority votes on the Supreme Court to hold statutes unconstitutional, such as a 2/3 majority,
or 7 of 9 Justices, or unanimity.57 It has also been suggested that Justices should have fixed terms
of office, such as 15 years, rather than life-time appointments, in order to minimize Supreme Court
independence.58 On the other hand, the importance of life-tenure in terms of the independence of
the federal judiciary has often been noted. Indeed, “[O]ne of the valuable things courts do is make
unpopular decisions that stick: decisions protecting the rights of minorities or preserving structural
features of the Constitution that frustrate the majority's will but have long-run benefits.”59

Societies based on the rule of law are more likely to evolve some form of robust judicial review.
This is because, as Alexander Hamilton observed in The Federalist No. 78:

56 For more detailed discussion of historical support in the 18th century for various versions
of natural law theory, and their agreement on use of legislative, executive, and social practice and
judicial precedent to fix meaning, and the rise only later in the 19th century of formalist theories,
see Charles D. Kelso & R. Randall Kelso, The Path of Constitutional Law §§ 8.4.1 &
See also R. Randall Kelso, Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living
Constitution, 72 U. Miami L. Rev. 112 (2017), and sources cited therein (a “true originalist” would
adopt a natural law style of interpretation based on the framers and ratifiers’ actual original intent).


58 See, e.g., Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life
Tenure Reconsidered, 29 Harv. J.L. & Pub. Pol’y 769 (2006); Paul D. Carrington, Restoring Vitality
to State and Local Politics by Correcting the Excessive Independence of the Supreme Court, 50 Ala.

59 Ward Farnsworth, The Regulation of Turnover on the Supreme Court, 2005 Ill. L. Rev. 407,
419 (2005). On judicial independence generally, see Honorable Gerald E. Rosen & Kyle W.
Harding, Reflections Upon Judicial Independence as We Approach the Bicentennial of Marbury v.
Madison: Safeguarding the Constitution’s “Crown Jewel,” 29 Fordham Urban L.J. 791 (2002);

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The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules . . . . The judiciary on the contrary has no influence over either the sword or the purse . . . . It may truly be said to have neither Force nor Will, but merely judgment . . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

The precise form of judicial review will naturally depend initially on the customs and traditions from which a society is evolving. Societies without a tradition of judicial review, such as most European countries, have tended to develop judicial review in the 20th century through the form of special constitutional courts, which resolve constitutional issues when referred to them by “elected politicians or ordinary judges,” rather than as part of ordinary judicial practice in the court system, as in America. Of course, the exact structure and design of these courts varies from country to country, including the provisions for service on the court, which in other countries have rejected life-tenure for judges in favor of fixed terms, in Europe typically between 6-12 years.60

The development of this form of judicial review, with the practice of European courts typically having the power to issue advisory opinions based on issue referral, is elaborated in an article by Professor Alec Sweet entitled, Why Europe Rejected American Judicial Review – And Why it May Not Matter.61 As Professor Sweet discussed, over time constitutional review in Europe and the United States have tended to merge, since “ordinary” judges in Europe “now engage in a great deal of constitutional interpretation and review”; European constitutional courts “routinely determine outcomes, just as any [American] court with general appellate jurisdiction”; and American courts are more willing today, as European constitutional courts have always been willing, to engage in the “abstract” review of legislation “prior to its application or enforcement,” typically through the power to issue declaratory judgments.

At the beginning of the 21st century, only a few Western industrialized countries, such as New Zealand and Australia, have no real form of judicial review. Canada has judicial review, subject to a limited legislative override in the “notwithstanding clause” of § 33 of the Canadian Charter of Rights and Freedoms – a clause which as of 2014 had never been used by the federal government, and used by 3 of Canada’s 10 provinces only in a few instances where subsequent events mooted its use in any event. England has judicial review to ensure conformity of parliamentary enactments


with European Union laws, such as the European Convention on Human Rights. De Tocqueville’s famous observation in 1835 that in America “every political question becomes a judicial question” is increasingly true for all Western industrialized countries under doctrines of judicial review.

Regarding the nature of adjudication in these countries, Professor Thomas Gray has noted:

Modern rights typically are phrased in terms of broad moral concepts – for example, the right of human dignity was made the central organizing value in the German Constitution, and the prestige of that constitution, and of the German Constitutional Court in implementing it, have made that "dignity clause" particularly influential for other constitutional regimes around the world. In several instances, courts have found the authority to articulate and enforce a body of unwritten constitutional rights, most notably in the European Court of Justice's determination that European Union legislation is implicitly subject to a body of general human rights drawn from the common traditions of the member states.

[Further] is a cluster of phenomena usefully grouped under the label "judicial globalization." In Europe, the treaties establishing the European Union, and the European Convention on Human Rights agreed to by members of the Council of Europe, have taken on higher-law status within the domestic law of European states, and the European Court of Justice and the European Court for Human Rights have increasingly exercised active judicial review powers over trade and human rights law respectively. Systems that come relatively late to strong judicial review, like the Eastern European countries after 1989, and the democratizing countries in Asia during the 1990s, find an established international style of constitutional and human rights adjudication ready for adoption. Human rights provisions are often borrowed from existing constitutions and conventions in the drafting of new ones, and this makes it natural for courts of different countries to cite each other's decisions, thus furthering the emergence of a new jus gentium of human rights. Judges increasingly meet with each other across national lines to discuss their work, and this creates more avenues for transmitting judicial techniques and doctrines that have proved successful and prestigious, for building judicial esprit de corps, and encouraging newer or less secure constitutional judiciaries to imitate the confident exercise of sweeping powers of the most admired and best-established ones.

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63 For an article acknowledging the general triumph around the world of judicial review, but discussing alternatives to complement that power, see Christopher S. Elmendorf, Advisory Counterparts to Constitutional Courts, 56 Duke L.J. 953 (2007).

This style of natural law decisionmaking focused on universal principles of human rights has been criticized by formalists, both on the static constitution model ground that at the founding Americans and Europeans had very different notions of constitutional democracy then, as noted by Justice Scalia, and by other formalists, such as Professor John Yoo, on the ground that the United States should not be in sync with Europe in moving in the direction of a society based on “laws and rules and transnational negotiation and cooperation,” but rather should advance a vision more in line with “power politics,” a vision reminiscent of the McKinley era of “Manifest Destiny.”

Use of international norms to advance human rights is separate from traditional interactions between domestic courts and international legal bodies. Given increasing globalization of commerce and travel, these traditional interactions have also increased over the past 25 years. It has been noted:

> The World Trade Organization Dispute Settlement Body considers whether U.S. regulations designed to protect endangered sea turtles violate free trade rules. The U.S. Supreme Court considers whether to stay the execution of foreign citizens at the request of the International Court of Justice. A French court decides whether it has the power to regulate websites in the United States that violate French law but are protected by the First Amendment to the U.S. Constitution. The International Criminal Tribunal for the former Yugoslavia considers whether to follow a precedent of the International Court of Justice on the issue of state responsibility for war crimes. . . . [E]ach case represents a facet of an emerging and interconnected international judicial system [of] transsubstantive rules of process and procedure that govern relationships among courts involved in international adjudication.

Prudentially, the practice of judicial review as it has evolved in most Western industrialized democracies seems sound. Under a tripartite model of review, as Professor Paulsen has stated, there would be a “constitutional world in which multiple actors [courts, legislators, executives, in federal and state governments], exercising their independent interpretive power, strive in good faith to check one another and hold each other to the meaning of the words of the Constitution’s text, and to guard against departures from the nation’s paramount law by any of the branches or organs of the federal or state government. What a wonderful, wonderful world that would be.” Contrary to this view, the conclusion reached by most governments in practice has been that such a vision would be a recipe for anarchy and chaos. Someone needs to have a final say on what is constitutional, and a Supreme Court is better suited than other constitutional actors because of its independence,

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67 Paulsen, supra note 55, at 2742.
detachment from politics, and tradition of reasoned decisionmaking. Further, judicial review encourages legislatures to consider the legitimacy of their goals, the extent to which a law's means relate to its goals, and the extent to which a law may interfere with individual or state rights, as they know their actions will be reviewed by courts. Finally, judicial review tends to insure against legislative omnipotence and executive abuses of power, and, thus, protects liberty.68

As practiced in the United States, judicial independence is aided by lifetime appointment and a prohibition against diminished compensation. The Court, in turn, is checked by the manner in which its members are appointed, by Congress' power over its jurisdiction and its size, and by the threat of impeachment. Further, judicial decrees must be enforced by the executive branch. If the executive branch threatens to break the law, the Court may check its activity. Judicial review thus complements Congress' impeachment power to prevent a threat of tyranny.

Study of the cases indicates that although there have been a number of unfortunate Supreme Court decisions, the long-run systemic consequences for the Nation of the Marbury v. Madison approach to judicial review have been more positive than negative. The most significant result is that constitutional questions are subjected to a deliberative process with several levels of review and a tradition of reasoned elaboration of constitutional principles of justice through the rule of law.

It is important to note that there is a distinction between positivism versus normativism as an approach to judicial decisionmaking, discussed here, and positivism versus normativism as a theory of law. For example, in his famous book, The Concept of Law, English legal philosopher H.L.A. Hart postulated that each society has a positive “rule of recognition” that defines which acts count as valid legal enactments.69 As phrased by Professor Hart: “What [positivists like Jeremy] Bentham and [John] Austin were anxious to assert were the following simple two things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.”70

In contrast, a normative theory of law counsels that there are moral restraints on what can constitute a valid “rule of recognition.” The classic defense of this position, by Harvard University Law Professor Lon Fuller, noted: “There is a twofold sense in which it is true that law cannot be built on


law. First of all, the authority to make law must be supported by moral attitudes that accord to it the competency it claims. Here we are dealing with a morality external to law, which makes law possible. But this alone is not enough. . . . We still cannot have law until our monarch is ready to accept the internal morality of the law itself.”71 Regarding the “inner morality of law,” Professor Fuller concluded that there are at least 8 different ways in which a possible “rule of recognition” could fail to reflect valid law. As stated by Fuller: “[(1)] The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration. A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.”72

A discussion about judicial decisionmaking styles is not about the legitimacy of Professor Hart’s rule of recognition as a general theory of law, but about noting that any society’s rule of recognition may be that judges should adopt a positivist or normative approach in their judicial capacities. For example, even if a judge held a generally “positivist” theory of the law, the judge might still adopt a natural law theory of interpretation if the judge decided that theory reflects the original “positive” intent of the framers and ratifiers. As has been noted, “[C]onsistent with this . . . understanding of the positivist claim, the act of constitutional interpretation in the United States may require every bit as much moral inspection as would be required by the most morally thick of natural law theories. The difference would be only that the tradition of positivism would see this as a contingent feature of modern American constitutionalism [based on natural law concepts like due process and equal protection, making an amoral conception of interpretation virtually impossible], while the natural law tradition [such as espoused by Fuller] would see this as an instance of a conceptual truth equally applicable to all existing and possible legal systems.”73 Justice Kennedy made a similar point in *Alden v. Maine,*74 in a passage not excerpted at § 8.3, when he noted that the relevant question was what approach was favored by the framers and ratifiers of the Constitution and the 11th Amendment, stating, “[T]he contours of sovereign immunity are determined by the founders’ understanding, not by the principles or limitations derived [independently] from natural law.”

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71 Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart,* 71 Harv. L.Rev. 630, 645 (1958).


74 527 U.S. 706, 734 (1999) (Kennedy, J., for the Court).
§ 2.1 Congressional Regulation of the Supreme Court’s Appellate Jurisdiction

1. The Doctrine of *Ex parte McCardle*

After providing for original jurisdiction in the Supreme Court, Article III, § 2 provides that “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.” Can such legislation, once enacted, deprive the Court of jurisdiction even as to pending cases? That was the issue presented in *Ex parte McCardle*.

In *McCardle*, a defendant challenged a judgment from the Circuit Court for the Southern District of Mississippi, which had denied his application for habeas corpus relief from his custody by military authorities while his trial was pending before a military commission. Defendant, a newspaper editor in Vicksburg, Mississippi, was held in military custody for trial before a military commission, based on his writing a series of articles critical of Reconstruction. A statute was in force that provided that judicial courts of the United States had the power to grant a writ of habeas corpus. The statute further stated that an appeal could be taken to the circuit court of the United States for the district, and from the judgment of the said circuit court to the United States Supreme Court. After oral argument was heard in McCardle’s case on March 9, 1868, the Radical Republican Congress apparently became concerned that the Supreme Court might use the case not only to release McCardle, but also to declare unconstitutional the Military Reconstruction Act on which was based the entire military occupation of the South. On March 12, 1868, Congress passed a bill which repealed that part of the earlier statute that allowed an appeal from the judgment of the circuit court to the Supreme Court or the exercise of any such jurisdiction by the Supreme Court on appeals. On March 25, 1868, President Johnson vetoed the bill. Congress overrode that veto by 2/3 majorities in each House on March 27, 1868. On March 30, 1868, the Senate was scheduled to begin the impeachment trial of President Johnson, which was addressed in this Coursebook at § 10.2.2 n.36. In the 20th century, the Supreme Court has indicated that Presidents have the authority to fire Cabinet Secretaries at-will, discussed at § 10.2.1(B) nn.25-28. Against the backdrop of President Johnson’s impeachment, the Court considered the case of *Ex parte McCardle*. 
Chief Justice CHASE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. The United States*, [10 U.S. (6 Cranch) 307 (1810)], particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

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. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.

On the other hand, the general rule, supported by the best elementary writers [4 Dwarris on Statutes 538], is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker* [54 U.S. (13 How.) 429 (1852)] and more recently in *Insurance Company v. Ritchie* [72 U.S. (5 Wall.) 541 (1867)]. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

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 except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. [Ex Parte McCardle, 6 Wallace 324 (1867)].

The appeal of the petitioner in this case must be Dismissed for Want of Jurisdiction.

The Court’s holding that Congress may withdraw appellate jurisdiction from the Supreme Court, even as to pending cases after oral argument, but before a decision was released, was based on the literal text of the “Exceptions” Clause, which provides in Article III, § 2, cl. 2 no limitation on “such Exceptions, and under such Regulations as the Congress shall make.” As the Court noted at the end of its opinion, other statutes providing for habeas jurisdiction in related cases were still in force, as noted in the Court’s decision later that year in *Ex parte Yerger, 75 U.S. (8 Wall.) 85, 102-06 (1868).*

Congress has used this power sparingly in our Nation’s history. However, where a strong enough political need has arisen, that power has been used, as in, for example, the Norris-LaGuardia Act of 1932, involving limiting federal court power to issue injunctions or restraining orders in labor disputes; the Selective Training and Service Act of 1940, restraining federal court review of selective service cases, principally by providing the individual must submit to induction and then
challenge the induction while in service; the Emergency Price Control Act of 1942, which provided that individuals can only challenge allegations of violations of price control measures before a special Emergency Court of Appeals; the Portal-to-Portal Act of 1947, which removed jurisdiction from the federal courts to hear cases on whether under the Fair Labor Standards Act certain work must be counted as overtime; the Voting Rights Act of 1965, which required state challenges to the Attorney General’s decision to suspend state voting regulations to be brought in the District of Columbia; and provisions limiting rights to appeal (typically prohibiting multiple appeals) for criminal defendants and aliens, such as in the Prison Litigation Reform Act of 1995, the Anti-Terrorism and Effective Death Penalty Act of 1996, and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996. In interpreting Congress’ intent, courts typically read limitations on jurisdiction narrowly, and have required a clear statement from Congress to remove jurisdiction from the federal courts.

2. Limits on Ex parte McC cardle

One limitation stated in Ex parte McC cardle itself is for “transactions past and closed.” Thus, when a final decision has been reached by the courts, that decision is res judicata, and cannot be altered by Congress. As the Court stated in Plaut v. Spendthrift Farm, Inc., “The record of history shows that the framers crafted this charter of the judicial department [Article III of the Constitution] with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy– with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a “judicial Power” is one to render dispositive judgments.’ By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.”

The Court’s holding in Ex parte McC cardle was also limited in United States v. Klein. In Klein, the Supreme Court refused to dismiss an action after the Civil War brought by a Southerner to recover property confiscated by Union forces, despite a congressional act requiring dismissal of such an action if the plaintiff’s loyalty was based on a Presidential pardon. Under the relevant Act, only loyal claimants, not rebels, could recover property under the law, and Congress did not want a Presidential pardon to make a person a loyal claimant, although the Court had ruled to the contrary in interpreting the effect of a Presidential pardon in United States v. Padelford, 76 U.S. 531 (1869).


The Court held the Act invalid because Congress had violated the separation of powers doctrine in two ways: it had denied effect to a Presidential pardon, and it had attempted to dictate how the Court should decide the factual issue of who was a loyal claimant. A principle was thus established that Congress cannot use its exceptions and regulations power to overrule a Court decision on constitutional meaning, as that would violate *Marbury*’s principle that it is “emphatically the province of the judicial department to say what the law is.” This is true, as in *Klein*, even if the congressional action is literally a regulation of the Court’s jurisdiction. Reflecting a natural law approach, the critical issue was the purpose and practical effect of Congress’ action, not a formalist focus on whether the Act was literally a regulation of jurisdiction.

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**United States v. Klein**  
80 U.S. 128 (1871)

Chief Justice CHASE delivered the opinion of the court.

The general question in this case is whether or not the proviso relating to suits for the proceeds of abandoned and captured property in the Court of Claims, contained in the appropriation act of July 12th, 1870, debars the defendant in error from recovering, as administrator of V. F. Wilson, deceased, the proceeds of certain cotton belonging to the decedent, which came into the possession of the agents of the Treasury Department as captured or abandoned property, and the proceeds of which were paid by them according to law into the Treasury of the United States.

It is to be observed, however, that the Abandoned and Captured Property Act was approved on the 12th of March, 1863, and on the 17th of July, 1862, Congress had already passed an act – the same which provided for confiscation – which authorized the President, "at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare." The act of the 12th of March, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the treasury, and left them there subject to such action as the President might take under the act of the 17th of July, 1862. What was this action?

The suggestion of pardon by Congress, for such it was, rather than authority, remained unacted on for more than a year. At length, however, on the 8th of December, 1863, the President issued a proclamation, in which he referred to that act, and offered a full pardon, with restoration of all rights of property, except as to slaves and property in which rights of third persons had intervened, to all, with some exceptions, who, having been engaged in the rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the United States and the union of the States thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.
On the 29th of May, 1865, amnesty and pardon, with the restoration of the rights of property except as to slaves, and that as to which legal proceedings had been instituted under laws of the United States, were again offered to all who had, directly or indirectly, participated in the rebellion, except certain persons included in fourteen classes. All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.

On the 7th of September, 1867, still another proclamation was issued, offering pardon and amnesty, with restoration of property, as before and on the same oath, to all but three excepted classes.

And finally, on the 4th of July, 1868, a full pardon and amnesty was granted, with some exceptions, and on the 25th of December, 1868, without exception, unconditionally and without reservation, to all who had participated in the rebellion, with restoration of rights of property as before. No oath was required. [Ed.: This final pardon was done by President Johnson after the 1868 Presidential election when Ulysses S. Grant, former General of the United States Army, was elected President.]

What, then, was the effect of the provision of the act of 1870 upon the right of the owner of the cotton in this case? He had done certain acts which this court has adjudged to be acts in aid of the rebellion; but he abandoned the cotton to the agent of the Treasury Department, by whom it has been sold and the proceeds paid into the Treasury of the United States; and he took, and has not violated, the amnesty oath under the President's proclamation. Upon this case the Court of Claims pronounced him entitled to a judgment for the net proceeds in the treasury. This decree was rendered on the 26th of May, 1869; the appeal to this court made on the 3d of June, and was filed here on the 11th of December, 1869.

The judgment of the court in the case of Padelford [76 U.S. (9 Wall.) 531 (1869)], which, in its essential features, was the same with this case, was rendered on the 30th of April, 1870. It affirmed the judgement of the Court of Claims in his favor.

Soon afterwards the provision in question was introduced as a proviso to the clause in the general appropriation bill, appropriating a sum of money for the payment of judgments of the Court of Claims, and became a part of the act, with perhaps little consideration in either House of Congress.

This proviso declares in substance that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition of pardon, shall be admissible in evidence in support of any claim against the United States in the Court of Claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that whenever any pardon, granted to any suitor in the Court of Claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and
protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive
evidence in the Court of Claims, and on appeal, that the claimant did give aid to the rebellion; and
on proof of such pardon, or acceptance, which proof may be made summarily on motion or
otherwise, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be
conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights
conferred by it, both in the Court of Claims and in this court on appeal.

Undoubtedly the legislature has complete control over the organization and existence of that court
and may confer or withhold the right of appeal from its decisions. And if this act did nothing more,
it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of
cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to
make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate
jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons
granted by the President the effect which this court had adjudged them to have. The proviso declares
that pardons shall not be considered by this court on appeal. We had already decided that it was our
duty to consider them and give them effect, in cases like the present, as equivalent to proof of
loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have
been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no
further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso
further declares that every pardon granted to any suitor in the Court of Claims and reciting that the
person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing
without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal,
of the act recited; and on proof of pardon or acceptance, summarily made on motion or otherwise,
the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement 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.

The court is required to ascertain the existence of certain facts and thereupon to declare that its
jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the
decision of a cause in a particular way? . . . We are directed to dismiss the appeal, if we find that
the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. . . .
Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial
Department of the government in cases pending before it?
We think not; and thus thinking, we do not at all question what was decided in the case of Pennsylvania v. Wheeling Bridge Company [59 U.S. (18 How.) 421 (1856)]. In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct." The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "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."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government – the Legislative, the Executive, and the Judicial – shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the 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.
Justice MILLER, with whom concurred Justice BRADLEY, dissenting.

I do agree to the proposition that the proviso to the act of July 12th, 1870, is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President. This power of pardon is confided to the President by the Constitution, and whatever may be its extent or its limits, the legislative branch of the government cannot impair its force of effect in a judicial proceeding in a constitutional court. But I have not been able to bring my mind to concur in the proposition that, under the act concerning captured and abandoned property, there remains in the former owner, who had given aid and comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act. I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the rebellion, is to me too apparent to be disregarded. In the one case the government is converted into a trustee for the former owner; in the other it appropriates it to its own use as the property of a public enemy captured in war. Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent. But if it did, why was not some provision made by which the title of the government could at some time be made perfect, or that of the owner established? Some judicial proceeding for confiscation would seem to be necessary if there remains in the disloyal owner any right or interest whatever. But there is no such provision.

In *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), a 6-2 Court held that Congress could make “as available for execution by holders of terrorism judgments against Iran ‘the financial assets that are identified in and subject to the proceedings’” in a specific identified case. The Court concluded that consistent with *Plaut v. Spendthrift Farm, Inc.* Congress could make this legal change while the case was pending, prior to a final decision in the case. The two-Justice dissent concluded that this congressional action was an attempt to usurp the judicial role by directing a result in a pending case, and thus violated general separation of powers principles discussed in *Plaut* and in *United States v. Klein*. *Id.* at 1332-35 (Roberts, C.J., joined by Sotomayor, J., dissenting). *See also* *Patchak v. Zinke*, 138 S. Ct. 897 (2018) (congressional statute directing courts to promptly dismiss suits relating to specific property held in trust by the federal government for a Native American tribe constitutional); *id.* at 912 (Ginsburg, J., joined by Sotomayor, J., concurring in the judgment) (without regard to jurisdiction, statute basically reinstates federal sovereign immunity over property, which is constitutional); *id.* at 914 (Roberts, C.J., joined by Kennedy & Gorsuch, J.J., dissenting) (by focusing on a specific piece of property, impermissible attempt to direct result in a particular case).

3. **Additional Possible Limits on *Ex parte McCordle***

A related set of issues concerns the extent to which Congress may limit the Court's appellate jurisdiction by legislation that either: (1) violates some prohibition found in the Constitution, such as relating to Equal Protection, Due Process, First Amendment, or Takings Clauses; or (2) violates general separation of powers principles by intruding too greatly into the powers of the judiciary.
With respect to the first issue, it is relatively well-established that other provisions in the Constitution do limit Congress’ power over jurisdiction. Thus, the Equal Protection Clause would likely prevent an attempt by Congress to remove jurisdiction in cases brought by women, minorities, or members of particular national origins. Limitations imposed on Congress’ jurisdiction-stripping power based on 5th Amendment Due Process Clause and Article I, § 9, cl. 2 Habeas Corpus Clause in enemy combatants cases are considered in Boumediene v. Bush, discussed at § 12.4.2 nn.44-52.

With respect to the second issue, it remains unsettled to what extent Congress can create barriers to the enforcement of constitutional rights through use of its power to create, or not, lower federal courts, and to create exceptions to the Supreme Court’s appellate jurisdiction. Although bills have often been introduced into Congress that would limit the Supreme Court’s jurisdiction over controversial decisions, such as taking away appellate power over transportation remedies in school desegregation cases, or in abortion cases, or in cases involving the validity of gay marriage, these bills have never become law. Thus, this issue has never been faced directly by the Supreme Court.

Under one view, adopted by most non-formalists, who engage fully in general contextual reasoning, general separation of powers principles should prevent Congress from being able to use its power over jurisdiction to intrude too greatly into the powers of the judiciary. Of course, persons adopting this approach can differ over how much intrusion might be too much. The alternative view, adopted principally by formalists, notes that the power of Congress over jurisdiction in the Constitution is literally plenary, with the exception of the Supreme Court’s original jurisdiction, and this suggests that Congress should have an unfettered role over jurisdiction in cases where Congress disagrees with the Court’s substantive decisions.


See, e.g., Michael J. Gerhardt, The Constitutional Limits to Court-Stripping, 9 Lewis & Clark L. Rev. 347 (2005) (proposed statute stripping federal courts over power to hear cases involving constitutionality of same-sex marriage bans would be unconstitutional); Martin H. Redish, Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For, 9 Lewis & Clark L. Rev. 363 (2005) (proposed statute would likely be constitutional, though perhaps politically unwise).

For non-formalist reasons of maintaining established government structures, as well as the liberal instrumentalist concern with protecting civil rights, and the natural law maxim of “where there is a right, there should be a remedy,” a Court majority today would likely view such congressional action as unwarranted. Even Holmesian deference-to-government Chief Justice Rehnquist noted in *Felker v. Turpin*\(^\text{10}\) that Congress had not attempted to remove all jurisdiction from the Court in the Anti-Terrorism and Effective Death Penalty Act of 1996 and thus “there can be no plausible argument that the Act has deprived [the Court] of jurisdiction in violation of Article III, § 2.” This suggests that if Congress had gone farther, Chief Justice Rehnquist might have had some concern.

A final set of issues regarding congressional control over federal court jurisdiction involves the question of the extent to which so-called Article I courts can be created to hear and try cases involving federal issues that are separate from Article III federal court jurisdiction. Congress has been held to have such power to create federal courts which do not have the Article III protections of life tenure and no diminution in salary in three general areas: (a) non-Article III courts in territories or the District of Columbia, because of the special congressional control over these areas listed in Constitution; (b) court-martial courts, because of congressional control over the military in the Constitution; and (c) legislative courts and administrative agency courts that adjudicate public, rather than private rights, by legislative and executive practice. Public rights cases involve actions to ensure compliance with a regulatory scheme. Since these rights are created by the legislature, and do not depend on common-law or constitutional rights, Congress can provide for Article I courts to adjudicate these claims since the rights did not have to be created by Congress in the first instance. This category includes such special courts as the Tax Court, the Patent Court, and the Claims Court, which hears cases involving claims on the federal treasury where the federal government has waived sovereign immunity, as in the Federal Tort Claims Act. This category also includes decisionmaking by Administrative Law Judges, such as for social security disability claims or immigration law matters. For further discussion of Article I courts, see Charles D. Kelso & R. Randall Kelso, *The Path of Constitutional Law* § 17.2.3.1 (2007) [http://libguides.stcl.edu/kelsomaterials]. See generally *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (Congress may grant direct appeal from Court of Appeals for the Armed Forces (CAAF), the top court in the military system, to the Supreme Court); *id.* at 2189 (Alito, J., joined by Gorsuch, J., dissenting) (since CAAF is not Article III court, direct appeal to Supreme Court not permissible; CAAF judges must be made Article III judges or appeal from CAAF should start in lower federal courts and then appealed to the Supreme Court).

4. **Congressional Control Over Lower Federal Court Power to Grant Mandamus or Exercise Jurisdiction in Cases Within The Supreme Court’s Original Jurisdiction**

With respect to lower state courts, the Supreme Court held in 1821 on grounds of intergovernmental immunity that state courts could not grant writs of mandamus against federal officials.\(^\text{11}\) The doctrine of intergovernmental immunity is also reflected in § 13 of the Judiciary Act of 1789, which

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\(^{10}\) 581 U.S. 651, 661-62 (1996).

provides for Supreme Court mandamus against courts only to “any court appointed . . . under the authority of the United States,” not state courts. With respect to federal district courts, the Court also held in 1821 that federal district courts were not authorized to issue writs of mandamus in aid of diversity jurisdiction. At the time, Congress had not granted the federal district courts general “federal question” jurisdiction, which only came in 1875. Lower federal court jurisdiction to grant mandamus actions against federal officials was thus limited to the federal Circuit Court of the District of Columbia. As held in 1838, that district court could exercise mandamus jurisdiction over executive officials subject to their in personam jurisdiction over the District of Columbia, as long as the executive official had offices in the District of Columbia, which was typical.

This review was expanded by later congressional acts. During the formalist era, as part of using the federal courts to advance the Republican economic agenda to limit government regulatory power over business under the Commerce Clause, discussed at § 6.1 nn.1-10, and economic substantive due process doctrine, discussed at § 17.1.2 nn.2-18, Congress expanded the jurisdiction of the district courts in 1875 to include general federal question jurisdiction. During the Holmesian era, as part of the triumph of the New Deal administrative state, Congress granted the district courts power in 1946 to review administrative agency action pursuant to the Administrative Procedure Act. In 1962, as part of the instrumentalist-era focus on providing individuals with greater protection against government abuse, Congress granted all federal district courts jurisdiction “in the nature of mandamus” to compel federal officials to perform their duties.

A different interpretation of the doctrine surrounding the mandamus provision in Marbury takes the view that the writs of prohibition and mandamus provisions of § 13 involved grants of “power” to the Supreme Court, the precise language of the second and third clauses of the last sentence of § 13, cited at § 1.2 nn.26, and not questions of “jurisdiction,” the precise language of the first clause in the last sentence of § 13. Under this view, Congress actually intended in § 13 to grant the Supreme Court general “supervisory” power to issue writs of mandamus against all federal officials, in any case whatsoever, viewing this “supervisory” power as independent of any question of original or appellate jurisdiction. This interpretation can be supported by noting that the Court, prior to Marbury, had considered a number of mandamus cases without even raising the question whether original or appellate jurisdiction was involved. Under this view, the Supreme Court, faced with

12 Id. at 602-03.


16 Id. at 1767-74, discussing, United States v. Hopkins (1794) (unreported case); Ex Parte Chandler (1794) (unreported case); Hayburn’s Case, 2 U.S. (2 Dall.) 409, 409-10 (1792); Susan Low
Jeffersonian opposition, retreated from the established, broader reading of the Court’s supervisory power over executive action, in favor of locating mandamus power principally in lower federal courts, subject to congressional authorization. By “turning the question of access over to Congress, the Court was able to draw on the support of another branch of government before taking on the executive. Giving Congress the lead also permitted a degree of legislative experimentation with different modes of action, before settling on a final institutional arrangement.”

This would have been particularly prudent since Jefferson so strongly believed that the President was charged with enforcement of the law, not courts pursuant to a mandamus power, that Jefferson did not even send an attorney to argue his side of the case in Marbury, but ignored the proceeding altogether. Despite “backing down” on general “supervisory” judicial power, the Court could use the result in Marbury to render the grant of mandamus power in § 13 unconstitutional, thus affirming the power of judicial review. This limitation on generic judicial power, independent of a statutory grant, was mirrored in a line of cases involving the issue of a federal common law of crimes, and the federal habeas power, which culminated in 1807 in Ex parte Bollman, with the Court holding that habeas jurisdiction must rest on congressional statutory authorization, and in 1812, when in United States v. Hudson & Goodwin, the Supreme Court rejected any power to enforce a federal common law of crimes, resting federal criminal jurisdiction on statutory authorization alone.

Concerning the original jurisdiction of cases involving states, § 13 indicated that only cases involving a state versus a state entity (state, federal, or foreign government) must be brought in the Supreme Court, since § 13 provided that civil cases involving a state versus citizens, whether of their own state, other states, or aliens, can be brought in the Supreme Court, but can also be brought in

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17 Merrill, supra note 14, at 511.


19 See Pfander, supra note 15, at 1599-1604, discussing, inter alia, Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (allowing resort to the common law to define the elements of habeas, but insisting that Congress confer the power by written law). But see Francis Paschal, The Constitution and Habeas Corpus, 1970 Duke L.J. 605, 613-17 (1970) (arguing that the Constitution intended to give courts power to issue habeas independent of statutory authorization).

district courts. This reflects the view of the drafters of § 13 that Congress can authorize cases within the Supreme Court’s original jurisdiction to be brought also in lower courts, and thus make such cases part of the Supreme Court’s appellate jurisdiction, as part of Congress’ power to make “Regulations” regarding the exercise of the Supreme Court’s appellate jurisdiction.21

This power was used by Congress in § 13 to permit state versus citizens cases, as well as cases brought by foreign ambassadors or public ministers, to be brought in local district courts, which geographically might make better sense in an individual case rather than requiring the case to be brought in the Nation’s capitol. At the same time, § 13 required state versus state cases and cases against foreign ambassadors or public ministers, who are likely to be domiciled in the Nation’s capitol, to be brought exclusively in the Supreme Court, again making geographic sense. Since foreign consuls and vice-consuls, as opposed to ambassadors or other public ministers, are often domiciled in cities outside the Nation’s capitol, the language in § 13 permitting cases by or against a consul or vice-consul to be brought in a district court also makes geographic sense. Given less geographic concern today, under the current statute, 28 U.S.C. § 1251(b)(1), there is original, but not exclusive, jurisdiction for all cases involving “actions or proceedings to which ambassadors, other public ministers, consuls, or vice-consuls of foreign states are parties” or “the United States and a State.” Only cases of states suing states must be brought originally in the Supreme Court.

Despite this power to authorize some cases within the Supreme Court’s original jurisdiction to be brought in district courts, Congress has no power to increase the Court’s original jurisdiction. This doctrine protects litigants from having to bring such cases in the Nation’s capitol, and protects the Supreme Court from having additional cases, requiring fact-finding and possibly trials, to be added to the Court’s docket.22 For most cases involving the Court’s original jurisdiction today, the Court will refer the case to a special master, who will receive evidence and prepare a record,23 rather than the Court hearing the evidence itself. In *Marbury v. Madison*, however, the Court did sit as a trial court to hear evidence regarding the failure of Marbury’s commission to be delivered.24

As of the late 1990s, the Court had decided roughly 170 original jurisdiction cases in its more than two hundred years of existence. While textually this original jurisdiction appears to be mandatory, the Court has refused to grant leave in some cases it regards as “picayune, such as when the state of California filed a contract action against the state of West Virginia in 1981 based on the failure of a West Virginia state university football team to play a California state team.”25 As a basis for

21 See generally Pfander, supra note 15, at 1762-63.

22 Id. at 1763-67.


24 See McConnell, supra note18, at 26-28.

25 Carstens, supra note 23, at 640.
justifying refusals to hear such cases, the Court cited in *Texas v. New Mexico*\(^{26}\) the burdens imposed by both its appellate docket and 28 U.S.C. § 1251, which the Court interpreted "as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." The Court noted in *Massachusetts v. Missouri*\(^{27}\) its qualified authority to refuse to exercise its jurisdiction, given "the broad statement that a court having jurisdiction must exercise it is not universally true."

Just as Congress cannot add cases to the Supreme Court’s original jurisdiction, there is no provision in Article III permitting Congress to remove cases from the Court’s original jurisdiction. Even with respect to the cases involving states versus individuals or cases brought by ambassadors or public ministers, Congress did not remove such cases from the Supreme Court’s original jurisdiction, but only provided that such cases could also be brought in district courts. The Supreme Court has always held that the Court’s original jurisdiction requires no authorizing congressional statute, but is “self-executing and needs no legislative implementation” to be effective.\(^{28}\)

Criminal cases involving state prosecution of individuals have never been held to be part of Article III’s federal jurisdiction, despite a literal reading of Article III that would include such cases. The language in § 13 regarding “civil cases” involving states underscores that the understanding of the framers and ratifiers of the Constitution was that “criminal cases” involving state law would be brought in state courts, with federal court review only for those cases that involved related federal issues, such as whether the state prosecution complied with the United States Constitution. Such review can happen either through an appeal from a state Supreme Court to the United States Supreme Court, as the Court held in *Cohens v. Virginia*,\(^{29}\) or by a writ of habeas corpus filed in the Supreme Court for cases involving the Court’s original jurisdiction, or in federal district courts challenging the state prosecution in other cases.\(^{30}\)

\section*{§ 2.2 \textit{Martin v. Hunter’s Lessee} and Federal Court Supremacy}

1. Federal Court Review of State Court Decisions

The core holding in *Marbury v. Madison* applied only to Supreme Court supremacy over the legislative branch of the federal government. Similar reasoning, however, would make the Supreme Court’s interpretation of the Constitution supreme over the federal executive branch. But can that supremacy be asserted through Supreme Court review of state court decisions?

\begin{itemize}
  \item \(^{26}\) 462 U.S. 554, 570 (1983).
  \item \(^{27}\) 308 U.S. 1, 19 (1939).
  \item \(^{28}\) See California v. Arizona, 440 U.S. 59, 65 (1979), and cases cited therein.
  \item \(^{29}\) 19 U.S. 96 (Wheat.) 264, 392-95 (1821).
  \item \(^{30}\) 42 U.S.C. § 2254 (habeas corpus statute).
\end{itemize}
On that question it was held in *Martin v. Hunter’s Lessee* that Congress can authorize federal court review of state court decisions. This was said to promote uniformity in federal law. As Justice Holmes once remarked, “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.”[^31] Only the Supreme Court has been authorized by Congress to review state court decisions on direct appeal. Under habeas jurisdiction, 42 U.S.C. § 2234, habeas cases may be filed in district courts reviewing the constitutionality of state court proceedings, but these are viewed as new proceedings, not appellate review.

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**Martin v. Hunter’s Lessee**

14 U.S. 304 (1816)

Justice STORY delivered the opinion of the court.

[Ed.: The plaintiff brought ejectment under a patent granted in 1789 by the state of Virginia, whose title was claimed to be vested in the state by escheat from the heirs of Lord Fairfax. The district court entered judgment for defendant Martin on the ground that his title, as heir of Lord Fairfax, was protected by the 1783 treaty of peace with England. The Virginia Court of Appeals (Virginia’s highest court) reversed, holding the treaty did not apply. The Supreme Court reversed the Virginia Court of Appeals and ordered that the district court’s judgment be executed. However, on remand the Virginia Court of Appeals ruled that the Supreme Court lacked jurisdiction to reexamine the title, and refused to obey the mandate of the Supreme Court. Chief Justice Marshall did not participate in the resolution of this case, as he and his brother James had signed a contract with Martin to buy the land in dispute. Martin had prevailed in the district court, but lost at the Virginia Court of Appeals, which was dominated by Jeffersonians, not Federalists like Marshall.]

This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of the United States: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States; that the writ of error, in this cause, was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were, coram non judice, in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares, that "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 government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or
to declare the means by which those powers should be carried into execution. It was foreseen that
this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended
to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages,
the events of which were locked up in the inscrutable purposes of Providence. It could not be
foreseen what new changes and modifications of power might be indispensable to effectuate the
general objects of the charter; and restrictions and specifications, which, at the present, might seem
salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed
in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate
legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the
public interests, should require.

Such is the language of the article creating and defining the judicial power of the United States. It
is the voice of the whole American people solemnly declared, in establishing one great department
of that government which was, in many respects, national, and in all, supreme. It is a part of the very
same instrument which was to act not merely upon individuals, but upon states; and to deprive them
altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the
exercise of others.

This leads us to the consideration of the great question as to the nature and extent of the appellate
jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the
constitution to the supreme court in all cases where it has not original jurisdiction; subject, however,
to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing
every case enumerated in the constitution, which is not exclusively to be decided by way of original
jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the
constitution to the supreme court. There can be no doubt that congress may create a succession of
inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial
power is delegated by the constitution in the most general terms, and may, therefore, be exercised
by congress under every variety of form, of appellate or original jurisdiction. And as there is nothing
in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist
in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme
court, and as to this court it may be exercised in all other cases than those of which it has original
cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The
appellate power is not limited by the terms of the third article to any particular courts. The words
are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all
other cases before mentioned the supreme court shall have appellate jurisdiction." It is the case, then,
and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in
vain to search in the letter of the constitution for any qualification as to the tribunal where it
depends. It is incumbent, then, upon those who assert such a qualification to show its existence by
necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious
import ought to be admitted, unless the inference be irresistible.
If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the
United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases
enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction
extend to all cases arising under the constitution, laws, and treaties of the United States, or to all
cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state
tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not
extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or
some of the other classes of cases in the constitution without control, then the appellate jurisdiction
of the United States might, as to such cases, have no real existence, contrary to the manifest intent
of the constitution. Under such circumstances, to give effect to the judicial power, it must be
construed to be exclusive; and this not only when the casus foederis should arise directly, but when
it should arise, incidentally, in cases pending in state courts. This construction would abridge the
jurisdiction of such court far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not
to establish, inferior courts at their own pleasure, and congress should not establish such courts, the
appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon
cases pending in the state courts. Under such circumstances it must be held that the appellate power
would extend to state courts; for the constitution is peremptory that it shall extend to certain
enumerated cases, which cases could exist in no other courts. Any other construction, upon this
supposition, would involve this strange contradiction, that a discretionary power vested in congress,
and which they might rightfully omit to exercise, would defeat the absolute injunctions of the
constitution in relation to the whole appellate power.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for
cases within the scope of the judicial power of the United States, which might yet depend before
state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would
incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the
United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to
extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively
attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend
by appellate jurisdiction, or not at all.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius
of our governments, and the spirit of the constitution. That the latter was never designed to act upon
state sovereignties, but only upon the people, and that if the power exists, it will materially impair
the sovereignty of the states, and the independence of their courts. We cannot yield to the force of
this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do
not yield our assent.

It is a mistake that the constitution was not designed to operate upon states, in their corporate
capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some
of the highest branches of their prerogatives. The tenth section of the first article contains a long list
of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state
sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supercede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere – wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.
On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

We have not thought it incumbent on us to give any opinion upon the question, whether this court have authority to issue a writ of mandamus to the court of appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause.

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester be, and the same is hereby affirmed.

2. Implications of Martin v. Hunter’s Lessee

The holding in Martin v. Hunter’s Lessee was extended to appeals in state criminal cases by Cohens v. Virginia. There was a literal, textual argument against this result, that is, that the Court could not have appellate jurisdiction because a state is a party in such a case, and the Court is granted original jurisdiction over cases in which "a State shall be a party." Marshall admitted there was dicta in Marbury stating that the grant of original jurisdiction implied the negative that Congress could not give the Court appellate jurisdiction over cases within its original jurisdiction. However, he distinguished Marbury, reasoning that the grant of original jurisdiction over cases in which a state

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32 19 U.S. (6 Wheat.) 264, 392-95 (1821).
is a party should not be construed to bar the appeal of cases involving a state where the subject is a question arising under federal law but where the case, from its nature, as in state criminal prosecutions, could not originate in the Supreme Court. Marshall said that to bar jurisdiction over such an appeal would destroy some purposes for which appellate power was conferred. Reflecting the natural law willingness fully to consider purpose, which is distinguishable from the formalist great reliance on literal text alone, Marshall stated that a negative should be implied from words granting original jurisdiction only where that promotes, not defeats, the intention of the framers.

Despite this concern for uniformity, state courts need not follow lower federal courts’ interpretation of the Constitution. Under the “dual theory of sovereignty,” addressed at § 8.1.2, state courts are part of an independent state judiciary, not hierarchically under the control of the lower federal courts. Thus, it is theoretically possible for a state court and a lower federal court to have differing views on the constitutionality of some state or federal law. Of course, the Supreme Court has the power under Martin v. Hunter’s Lessee to resolve the conflict with a decision binding both state and lower federal courts. Prudential considerations of uniformity of result, however, mean that most state courts pay great attention to lower federal court decisions on matters of federal statutory or constitutional law. The usual practice is that state courts ask themselves how the Supreme Court would decide a question, and use lower federal court decisions as well as Supreme Court decisions to answer that question. Not surprisingly, state courts tend to give great weight to lower federal court decisions if all the federal decisions have gone the same way. Reflecting the sovereignty of the state courts from the lower federal courts, however, a state court in California, a state part of the federal Ninth Circuit Court of Appeals, noted that no greater weight need be given to decisions by the Ninth Circuit than to decisions from other circuits. In practice, most state courts do pay more attention to federal opinions from the federal circuit court overseeing their state.

Under the dual theory of sovereignty, state Supreme Courts are the authoritative interpreters of the meaning of state law matters, including whether state statutes violate state constitutional provisions. Both the United States Supreme Court, and lower federal courts, are bound by state Supreme Court decisions on state law matters, as long as that state law does not conflict with federal statutes or the United States Constitution. In case of conflict, the Supremacy Clause of Article VI, cl. 2 of the United States Constitution provides: “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.”

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3. Doctrine of Adequate and Independent State Grounds

Reflecting the dual theory of sovereignty, state Supreme Court decisions on purely state law matters cannot be reviewed by federal courts, since state Supreme Courts are the authoritative interpreters of their own state law. See Murdock v. Memphis, 87 U.S. 590 (1875). Further, issues of federal law resolved by a state Supreme Court will not be reviewed on appeal by federal courts if the state Supreme Court judgment rests upon an "adequate and independent" state ground. See Michigan v. Long, 463 U.S. 1032 (1983). Thus, a state Supreme Court decision invalidating a state law on both state and federal constitutional grounds will not be reviewed by the United States Supreme Court because that would result in nothing more than an advisory opinion. However, a state court's decision on state law grounds will not block Supreme Court review in two rare cases. These are if the state decision involves: (1) a good faith interpretation of state law that places unreasonable obstacles in the way of enforcing federal rights, such as a rule of local procedure that would frustrate the vindication of federal rights; or (2) an attempt to evade federal law through a strained interpretation of state law, as might occur with a strained interpretation of whether a contract exists or what rights were granted in the contract to avoid Contract Clause review, or what is property to evade Takings Clause review.

Suppose it is unclear whether the state court decision rests upon an adequate and independent state ground? In Michigan v. Long, Justice O'Connor wrote for the Court that if a state decision seems to rest on or be interwoven with federal law, and the adequacy and independence of any possible state ground is not made clear by a plain statement, the Court will assume the state court believed that federal law required the decision. The Court will not review a state case if the state court makes a plain statement that federal cases are used only to guide the decision on state law. Justice O'Connor explained that this approach would serve the need for uniformity in federal law; reflect the dual theory of sovereignty, by expressing respect for state courts and minimizing interference by not asking state courts to clarify their opinions; manage the Court’s resources by minimizing the need for federal courts to determine state law; and help avoid advisory opinions. Each of these goals has been substantially served in practice by operation of the Michigan v. Long rule.

37 See Murdock v. Memphis, 87 U.S. 590 (1875).


41 See generally Michael Esler, Michigan v. Long: A Twenty-Year Retrospective, 66 Albany L. Rev. 835 (2003). Each of the four liberal instrumentalists on the Court at the time Michigan v. Long was decided dissented. Justice Stevens’ dissent was the most forceful, adopting the opposite presumption that the state grounds were independent absent a clear statement to the contrary. 463 U.S. at 1066-68 (Stevens, J., dissenting). Such a presumption would also make it easier for state courts to develop their own constitutional law that might provide for greater protection for
For the separate issue of cases heard in federal court that involve resolving issues of state law, as can occur in diversity cases or interpretation of a state statute to determine if the statute violates federal law or the United States Constitution, federal courts must follow state Supreme Court opinions on point. Where the state law is not clear, federal courts will give persuasive weight to the opinions of state Supreme Courts and lower state courts on the meaning of state law; may “certify” a question on state law to a state Supreme Court asking that court for guidance in cases where the meaning of state law is not clear; or may abstain from deciding the case, based on the uncertainty.\textsuperscript{42}

The United States Supreme Court has indicated that it will give some deferential weight to a federal Court of Appeals judgment on the meaning of state law for those states covered by that federal Court of Appeals, on the ground that those judges are more likely to be familiar with those state law issues than the Supreme Court; however, that deference is often rebutted in practice.\textsuperscript{43} The Court indicated in \textit{Salve Regina College v. Russell}\textsuperscript{44} that Court of Appeals should not give such deference to district court determinations of state law, but instead apply \textit{de novo} review, based upon the better institutional competence of court of appeals judges to determine question of law, as opposed to questions of fact. Commentators have disagreed over the wisdom of the \textit{Salve Regina} decision.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{44} 499 U.S. 225, 231-40 (1991).
\end{itemize}
Determining the meaning of a provision in a state Constitution can be particularly difficult for both state and federal courts where many state Constitutions have similar provisions. The question naturally arises whether the framers and ratifiers in any one state intended their provision to have similar meaning to similar provisions in other state Constitutions.46

4. Constitutional and Prudential Due Process Clause Restraints on Jurisdiction of Cases Heard in Federal and State Courts

In addition to congressional restraints on federal court jurisdiction, the Fifth and 14th Amendment Due Process Clauses impose limits on federal and state courts concerning the assertion of personal jurisdiction over defendants. There are two kinds of personal jurisdiction: general and specific. If there is general jurisdiction, the defendant must defend regardless of whether the action arose in the state where the lawsuit has been brought, the so-called “forum” state. General jurisdiction exists when a defendant’s contacts with the forum state are sufficiently substantial, continuous, and systematic, even if unrelated to the instant cause of action.47 Specific jurisdiction may be found where a foreign defendant has purposively directed activities at residents of the forum, and the litigation results from alleged injuries that arise out of, or relate to, those activities.48

During the original natural law era and the formalist era, the Court followed the customary rules regarding personal jurisdiction that focused on whether the defendant resided in the forum state, consented to suit in the forum state, or whether service on the defendant had been able to be brought in the forum state based on the defendant’s presence in the state, as in Pennoyer v. Neff.49 However, in 1945, the Court broadened the required contacts in International Shoe Co. v. Washington50 to include all non-residents who have such minimum contacts with the forum that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” Such minimum contacts have been held to exist when “the defendant’s conduct and connection with the forum state are such that he or she should reasonably anticipate being haled into court there.”51 In assessing the defendant’s reasonable anticipation, “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,


49 95 U.S. 714, 724-26 (1877).

50 326 U.S. 310, 316 (1945).

thus invoking the benefits and protections of its laws.”

Reflecting the greater use of factor weighing approaches since 1937, addressed at § 1.1.4, the courts post-*International Shoe* examine several factors to make this “minimum contacts” determination. These include: (1) the nature and quality of the defendant’s contacts with the forum state; (2) the quantity of the contacts; (3) the relationship between the cause of action and the contacts; (4) the forum state’s interest in providing a forum for its residents; and (5) the convenience of the parties.

While the instrumentalist-era decisions had an expansive view of when personal jurisdiction could exist, so the court would have the power to hear the case and get to the merits, the modern natural law approach, being more of an analytic approach following the logic of the facts, combined with formalist literalism and Holmesian deference-to-government, has meant the Court has been less willing to find personal jurisdiction exists in close cases today.

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54 Since 2010, the Court has limited “general jurisdiction” by recasting the (a) “fair play and substantial justice” and (b) “continuous and systematic” language from *International Shoe*, with one factor being “[a]n ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business,” id. at 317, to state general jurisdiction now applies only when the “affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum state.” Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (mere fact the tires made by Goodyear’s foreign subsidiaries may have reached North Carolina through stream of commerce insufficient to create general jurisdiction); Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011), rehearing and rehearing en banc denied, 676 F.3d 774 (9th Cir. 2011) (Mercedes-Benz USA has substantial contacts in California, and it is DaimlerChrysler’s agent for purposes of personal jurisdiction), rev’d, 134 S. Ct. 746, 761 (2014) (no general jurisdiction over Daimler-Chrysler AG, despite Mercedes-Benz USA being Daimler’s agent for distributing Daimler-manufactured vehicles). Absent place of incorporation or principal place of business, it is now unclear what “exceptional circumstances” exist to find a business is “essentially at home” in the forum state. See, e.g., BNSF R. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (no general jurisdiction to sue BNSF Railway Co. in Montana for injuries to railroad workers outside of Montana, despite BNSF having over 2,000 employees in Montana and 2,000 miles of track in Montana, as BSNF was not incorporated in Montana, nor did it have its principal place of business in Montana, nor was it like *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), where defendant temporarily located its principal place of business from the Philippines to Ohio during World War II); 137 S.Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part) (Court should follow *International Shoe* and find contacts are sufficient).
In addition to this Due Process constitutional constraint, the Court also has developed a prudential restraint on the exercise of jurisdiction. Under the *forum non conveniens* doctrine, courts will decline constitutionally permissible jurisdiction if another court is a more convenient forum for the lawsuit. This convenience may result from the easier availability of that forum for the plaintiff, the defendant, or witnesses that may be called to testify at trial.55

### § 2.3 Judicial Review During Eras of Supreme Court Decisionmaking

#### 1. Judicial Review During the Original Natural Law Era: 1789-1873

As noted at § 1.2 nn.28-30, the Court’s ultimate conclusion in *Marbury* was that the Court lacked original jurisdiction to grant Marbury’s mandamus request to require delivery of his commission for a position as a federal justice of the peace. Thus, Jefferson and Jefferson’s Secretary of State, James Madison, prevailed in the case. Given this conclusion, the Supreme Court, per Chief Justice Marshall, was able to criticize the Jefferson Administration for violating Marbury’s rights by denying him the commission, while avoiding the risk of impeachment by the Jeffersonians if the Court had ordered Marbury’s commission to be delivered. Federal judges who differed with the Jeffersonians faced a risk of impeachment, as shown by the impeachment of Justice Chase in 1804, discussed at § 10.2.2 n.35. As stated by Professor Kermit Hall, “Marshall seems to have believed (probably correctly) that if Chase had been convicted, he would have been the next target.”56

This result in *Marbury* blunted opposition by the Jeffersonians to the broader aspects of Chief Justice Marshall's reasoning on judicial review. Thus, Marshall planted a seed which grew to

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55 *See, e.g.*, Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384 (2nd Cir. 2011) (Peruvian statute limiting to 3 percent the portion of an agency’s budget that can go toward paying a judgment was a strong factor counseling an American court is not the proper forum to resolve $21 million dispute between American engineering company and Peruvian government). *See generally* Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conviens and Forum Non Conveniens*, 7 Tulane L. Rev. 91 (1999).

become the modern version of judicial review. Regarding the “in pursuance” language of Article VI, probably the better reading of that text, consistent with *Marbury*, is that it refers not only to procedural limitations on legislation action, but also to substantive limitations. For example, a law “that went through bicameralism and presentment and that abrogated the right to jury trial hardly seems to have been ‘made in pursuance’ of the Constitution. Instead, such a statute would be ‘made in opposition’ to the Constitution.”57 During Marshall's tenure as Chief Justice, the only other case holding an act of Congress unconstitutional was *Hodgson v. Bowerbank*58 in 1809. As in *Marbury*, the result in *Hodgson* could be justified under the tripartite theory because the Court struck down a provision of the Judiciary Act of 1789 regarding jurisdiction to hear cases where an “alien is a party,” which was alleged to confer jurisdiction on federal courts to try suits between aliens, a subject matter not mentioned in Article III's list of cases to which federal judicial power extends.

The next act of Congress to be found invalid, an act to which the tripartite theory could not be applied, was the Missouri Compromise, struck down, at least in *dicta*, in 1857 in *Dred Scott v. Sandford*,59 excerpted at § 16.4.2. However, that case can hardly be regarded as a solid foundation for judicial review, since it was overruled by the Civil War Amendments. The flaws in the *Dred Scott* opinion, however, did provoke comment regarding the nature of Supreme Court precedents. For example, in his First Inaugural Address, President Abraham Lincoln admitted that Supreme Court decisions were entitled to great respect by other departments, but expressed doubt whether a judicial declaration of unconstitutionality ought to be binding on other persons acting in their representative capacities. President Lincoln said: “The candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal.”60

This view is consistent with *Marbury*. Indeed, this view had been used earlier by President Andrew Jackson, who vetoed in 1834 a bill to re-authorize the Second National Bank of the United States, whose 20-year charter ran out in 1836, in part based on his view that the bank was unconstitutional, even though the Court in 1819 had declared it constitutional in *McCulloch v. Maryland*. Jackson’s view was that as President he could make his own determination of constitutionality for purpose of justifying a presidential veto. Similarly, under *Marbury*, Congress is free to refuse to pass a bill on grounds that a majority of House or Senate believe the bill unconstitutional, even if Court precedents suggest a different result. Indeed, Congress is free to pass a bill that Court precedents suggest is


58 9 U.S. (5 Cranch) 303 (1809).

59 60 U.S. (19 How.) 393 (1857). *Dred Scott* is discussed in greater depth at § 16.4.2.

unconstitutional, as Congress did when passing a “no flag burning” bill after the Court had struck down in Texas v. Johnson a similar state “no flag burning” statute. Predictably, in United States v. Eichman, the Court struck down the congressional statute.61

A more extreme view was stated in 1987 by Attorney General Ed Meese, but was later withdrawn. Under that view, a judicial decision is binding “only with respect to the named parties, leaving officials theoretically free to ignore the Supreme Court’s pronouncement in dealing with the remainder of the public – at least until officials are once again taken to court.”62 Such a view, adopting a form of civil disobedience by government actors, is contrary to respect for Marbury’s principle of judicial review. An even more vigorous rejection of Marbury is reflected in President Jackson’s ignoring the Supreme Court’s decision in 1832 in Worcester v. Georgia protecting the Cherokee tribe in Georgia, and instead marching them on the “Trail of Tears” to Oklahoma. Jackson is “apocryphally” reported to have said, “John Marshall made his decision; now let him enforce it.”63

After Dred Scott, the next case to invalidate an act of Congress was the Legal Tender Act, which made paper treasury notes valid even for preexisting debts, struck down in 1870 in Hepburn v. Griswold. That case was promptly overruled in 1871 in Knox v. Lee.64 In sum, the power of judicial review, while stated in Marbury, was not cemented by frequent use from 1789 to 1873.

### 2. Judicial Review During the Formalist Era: 1873-1937

Between 1873 and 1937, formalist-era courts had only to apply Marbury and Hunter’s Lessee to the cases that came before them. Despite lack of explicit textual support, the doctrine of judicial review had ceased to be an innovation and had become a part of the American legal system. In terms of formalist theories of precedent, addressed at § 2.4.6 n.79, judicial review had become “settled law.” As a consequence, during the formalist era, many statutes were struck down as unconstitutional. By the turn of the century, the Court had struck down application of the Sherman Act to manufacturers in United States v. E.C. Knight Co., and was on its way to the many cases in the early 1900s that struck down acts of Congress or state legislatures as violations of the 14th Amendment Due Process Clause or the Commerce Clause.65 During this Lochner era the Court was concerned by what it saw

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64 Knox, 79 U.S. (12 Wall.) 457 (1871), overruling, Hepburn, 75 U.S. (8 Wall.) 603 (1870).

65 See, e.g., United States v. E.C. Knight Co., 156 U.S. 1 (1895); Lochner v. New York, 198 U.S. 45 (1905); Adkins v. Children’s Hospital, 261 U.S. 525 (1923) ( Due Process cases); Hammer
as deprivations by legislatures of rights to contract and own property, rights thought necessary for a successful economy. Criticism of formalist-era decisionmaking focused more on the formalist style of constitutional interpretation, and not on the fact of judicial review itself.66


The Holmesian era between 1937 and 1954 was characterized by a retreat from Lochner-era review of social and economic legislation. Consistent with the Holmesian approach toward judicial review, the Court gave considerable deference to legislative and executive decisions. The Court invalidated only three minor actions of Congress during this period. In 1943, the Court struck down § 2(f) of the Firearms Act, which established a presumption of guilt based on a prior conviction and present possession of a firearm. In 1946, the Court held that Congress had created an invalid Bill of Attainder when it provided that no salary should be paid to certain named federal employees. In 1952, the Court held void for vagueness under the Due Process Clause of the Fifth Amendment a provision of the Federal Food and Drug Act that imposed criminal liability for refusing entry or inspection of business premises.67 The Supreme Court also held the President in check and invalidated a few state laws. For example, the Court held that President Truman violated the Constitution when he seized a steel mill to prevent a strike that could interfere with production needed for military action in Korea.68 As an example of a state law invalidated, the Court held that enforcement of a racially restrictive covenant was a violation of the Equal Protection Clause.69

Despite a fewer number of cases holding governmental acts unconstitutional during the Holmesian era, as opposed to the formalist era, the basic concept of the judicial power to engage in judicial review remained as a matter of settled law. The main contribution of Holmesian jurists to the concept of judicial review was Holmesian Justice Brandeis’ statement in Ashwander v. Tennessee Valley Authority of seven basic principles of prudence that should be used to guide judicial review. Although these prudential principles are adopted by judges in each of the four decisionmaking styles, and Ashwander was decided in 1936 at the end of the formalist era, just predating the dawn

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67 Tot v. United States, 319 U.S. 463 (1943) (Firearms Act); United States v. Lovett, 328 U.S. 303 (1946) (Bill of Attainder case); United States v. Cardiff, 344 U.S. 174 (1952) (Food and Drug Act case). For a listing of acts of Congress held unconstitutional by the Supreme Court, see Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States (1999) (internet search using as key words “acts of Congress held unconstitutional”).

68 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), excerpted at § 9.1.2.

69 Shelley v. Kraemer, 334 U.S. 1 (1948), excerpted at § 15.3.
of the Holmesian era, the principles are most consistent with the Holmesian focus on judicial restraint and deference to government. These *Ashwander* prudential principles state that the Court:

1. will not pass upon the constitutionality of legislation in a friendly, nonadversary case, because to decide such questions “is legitimate only as a last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.”
2. will not “anticipate a question of constitutional law in advance of the necessity of deciding it.”
3. will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”
4. will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.
5. will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.
6. will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
7. “. . . even if a serious doubt of constitutionality is raised, . . . will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

An additional principle of judicial restraint suggests:

8. the Court should be willing to remand cases to lower federal courts if further factual development is necessary for a truly informed decision on constitutionality to be made.

4. **Judicial Review During the Instrumentalist Era: 1954-1986**

The instrumentalist Court between 1954 and 1986 remade many areas of constitutional law by frequent use of the power to declare unconstitutional both federal and state laws. The Court in those 33 years invalidated more than 50 congressional acts in whole or in part, beginning in 1954 when holding that Congress may not operate racially segregated schools in the District of Columbia. Of course, the Court also applied the *Marbury* principle of judicial review to executive branch action,

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including action of the President,\textsuperscript{74} and to action by states, including state legislatures and Governors.\textsuperscript{75} Many of these cases involved civil rights challenges to government action, or involved the rights of criminal defendants. This is consistent with the instrumentalist predisposition toward judicial review, which views the Court as a protector of the unempowered in society, with a special focus on civil liberties protections in the Constitution.

5. Judicial Review During the Modern Natural Law Era: 1986-Today

The pace of invalidating laws has ebbed somewhat during the period of domination by modern natural law Justices, and the emphasis has shifted from the heightened instrumentalist concern over civil rights to a concern with structural matters as well. For example, the modern Court has invalidated a number of congressional statutes that attempted to abrogate state 11th Amendment immunity by authorizing civil actions against states as a means of enforcing the 14th Amendment. The Court found in each case that Congress exceeded its enforcement power because it had not sufficiently identified state violations of the 14th Amendment, addressed at § 8.2.3. The Court has found unconstitutional statutes exceeding Congress’ Commerce Clause power, addressed at § 6.4.\textsuperscript{76}

Based on the practice of 200 years of legislative and executive acquiescence, and uniform Court precedents, the doctrine of judicial review is firmly established in the law today. Under this doctrine, courts may declare a law invalid "on its face," so that it cannot be applied to any fact situation, or declare the law "invalid as applied" to a particular fact situation. The Court has expressed a preference for first considering an "as applied" challenge, since that enables courts to avoid making unnecessarily broad constitutional judgments.\textsuperscript{77}

As of 2000, the Supreme Court had declared 156 Acts of Congress unconstitutional, and had invalidated roughly 1,150 state laws. Among the 156 Acts of Congress, ten involved the District of Columbia. Among the remaining 146, only 26 occurred in the nineteenth century, with the remaining 120 from 1900-2000, with 37 by the Rehnquist Court since 1986.\textsuperscript{78}

\textsuperscript{74} See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (the President does not have an absolute claim of confidentiality for all communications).


§ 2.4 Limits on the Supreme Court’s Power of Judicial Review

There are a number of federal, state, and citizen limits on the Supreme Court’s power of judicial review.

1. **Congressional Regulatory Power**

As addressed at § 2.1, Congress has the power under *Ex parte McCordle* to regulate the appellate jurisdiction of the Supreme Court, as well as regulate the jurisdiction of the lower federal courts, subject to a potential limit that Congress could not so limit the Supreme Court’s jurisdiction so at to undermine the judicial role “emphatically . . . to declare what the law is,” as stated in *Marbury*. As discussed at § 10.1 nn.2-3, Congress also has the power to change the size of the Supreme Court through legislation, and the Senate has the power to confirm Presidential nominees to the federal bench. This limits which judges will be deciding cases under the power of judicial review.

2. **Congressional Spending and Impeachment Power**

Under its Spending Clause power, addressed at § 7.2, Congress has the power to cut funding for federal courts and refuse to give pay raises to federal judges. Congress cannot decrease federal judicial salaries because of Article III, § 1 which provides, “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, as stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.” As discussed at § 10.2.2 n.35, Congress has the power of impeachment for both executive officials and federal judges in cases of “Treason, Bribery, or other high Crimes and Misdemeanors,” a power Congress has used sparingly, removing only a handful of judges, most for bribery.

3. **Executive Limitations**

As discussed at § 10.1 nn.1-2, the President is given the power to nominate judges to the federal bench. In practice, for judges appointed to the lower federal courts, Presidents often consult with Senators from the affected States before making a nomination. As discussed at § 2.3.1 nn.60-61, Presidents have their own power to make judgments on the constitutionality of government action in the absence of direct Supreme Court precedent on point, as indicated by President Lincoln’s response to the Supreme Court’s decision in *Dred Scott v. Sanford*. As discussed at § 10.3 nn.47-50, Presidents have prosecutorial discretion to make decisions regarding enforcement of the law, subject to the reminder in Article II, § 3 that “he shall take Care that the Laws be faithfully executed.”

4. **State and Individual Citizen Limitations**

State officials, and the populace generally, also have the ability to protest federal court decisions with which they disagree, and may be reluctant to enforce vigorously or abide by decisions with which they disagree. A prominent example involves certain societal responses to the Supreme Court’s decision in 1954 in *Brown v. Board of Education* to require schools to desegregate, discussed at § 21.1 nn.1-2, 16-18.
5. **Justiciability Limitations**

An additional set of limitations, discussed in Chapters 3 & 4, is that federal courts can only hear cases which are justiciable. This requires that a party bring a lawsuit, that party have standing, the case is ripe for resolution, is not moot, and does not involve an issue which is a political question inappropriate for Court review. The Supreme Court has no power to reach out and render advisory opinions on the constitutionality of government action.

6. **Judicial Precedents**

Prior court precedents also limit, to some extent, how the Supreme Court decides cases today. Formalist and natural law judges, whose analytic approach to law makes highly relevant the logical elaboration of doctrine, tend to weigh heavily in their consideration of precedent whether it appears to represent "settled law." Holmesian judges, because they take a positivist approach to the law, also evidence a willingness to follow precedents with which they disagree if the precedent represents settled law. Justice Scalia has defined such "settled law" as "long-standing and well-accepted principles (not out of accord with the general practices of our people, whether or not they were constitutionally required as an original matter)."

A second reason to follow a precedent even if it was wrongly decided is that individuals have substantially relied on the precedent. It is a familiar notion that where individuals have substantially relied to their detriment on some promise, or some represented state of affairs, other individuals may be estopped from changing or denying that state of affairs in order to protect the reliance interest. This can also be true of precedents. As Justice Brandeis observed in *Burnet v. Coronado Oil & Gas Co.*, "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." In *Payne v. Tennessee*, Justice Rehnquist noted that cases "involving contract and property rights" are the ones most likely to engender substantial reliance that is important from the perspective of *stare decisis*. This is because overruling would upset expectations upon which people have relied in making financial, business, employment, or other kinds of important commitments. In contrast, according to Justice Rehnquist, cases "involving procedural or evidentiary rules" are not as likely to involve such substantial reliance. Justice Rehnquist noted in *Payne*, "Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions."

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80 See, e.g., Restatement 2d, Contracts § 90 (promissory estoppel); Strong v. County of Santa Cruz, 542 P.2d 264, 266 (Cal. 1975) (equitable estoppel).

81 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).


83 Id. at 828 & n.1 (listing of cases).
Because of a functional understanding of doctrine as a means to individuals' and society's ends, Holmesian judges tend to weigh this variable very heavily in their consideration of precedent. Since reliance is linked to certainty and predictability in the law, as well as to traditional notions of equity and the background moral principle of protecting individuals' reasonable reliance, the concern with reliance upon a precedent is also given significant weight by formalist and natural law judges. However, as between the considerations of settled law versus reliance, the analytic predisposition of the formalist approach has meant that formalist judges tend to place greater weight on whether the precedent is settled law, rather than a concern with substantial reliance. For the Holmesian approach, the functional concern with substantial reliance tends to be equally, if not more, important.

Because instrumentalist jurists embrace the notion of an evolving constitution to cope with current problems and current needs, they do not want to be straight-jacked by a reasoned elaboration of precedents if those precedents are against the instrumentalist's view of text, context, history, practice, and prudential considerations. Thus, instrumentalist judges have been quite willing to overrule precedents, and create new doctrine.

Of course, where the proper social policies would be advanced by maintaining adherence to precedent, an instrumentalist judge may emphasize the importance of precedents, as in Justice Marshall's dissent in Payne v. Tennessee. There, he stated, “Because I believe this Court owes more to its constitutional precedents in general and to Booth and Gathers in particular, I dissent.” However, given the willingness of instrumentalist judges to overrule of precedents between 1954 and 1986, one must take with a grain of salt Justice Marshall's statements in Payne on the importance of stare decisis. Justice Scalia’s concurrence in the case, joined by Justices O'Connor and Kennedy, responded, “The response to Justice Marshall’s strenuous defense of the virtues of stare decisis can be found in the writings of Justice Marshall himself. . . . It seems difficult for those who were in the majority in Booth to hold themselves forth as ardent apostles of stare decisis.”

For natural law judges, a sequence of court decisions, that is, a reasoned elaboration of precedent, can provide a gloss on meaning that changes what the Constitution means. Thus, the question is not just what the other sources of interpretation suggest about a constitutional provision's meaning. Instead, just as the common law changes over time in response to court decisions, the proper meaning of a constitutional provision can change over time in response to court decisions elaborating its meaning in a particular way. Judges who believe very strongly in this traditional common-law commitment to reasoned elaboration of the law may choose to follow precedents they believe are wrongly decided even if those precedents do not represent settled law and there has been no substantial reliance upon them. Instead, under this approach to precedent, one or more additional special reasons are needed before the court should depart from a prior judicial opinion.


85 Id. at 833-34 (Scalia, J., joined by O'Connor, J., & Kennedy, J., concurring).
Based upon recent cases, the additional special reasons which suggest that a precedent should be overruled can be grouped under five headings: (1) the precedent is unworkable in practice; (2) the precedent creates an inconsistency or incoherence in the law; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the precedent represents a substantially wrong or substantially unjust interpretation of the law, or is based on substantially flawed reasoning; or (5) the precedent raises concerns about a commitment to the "rule of law," such as being a precedent decided without full briefing and argument.86

Courts sometimes adopt a narrow, or strict, use of precedent, particularly when trying to distinguish a prior case from the present case. Under this use of precedent, courts limit the preceding case to its "core holding." This is more often done by judges wishing to limit the impact of precedents, like instrumentalist Justices or formalist Justices who wish to restrict the binding force of precedent to those decisions which are "settled law." Natural law Justices, more focused on reasoned elaboration of law, may refer not only to the core holding of the precedent, but also to its "general reasoning."

A summary of these four judicial decisionmaking approaches to precedent follows in Table 8:

<table>
<thead>
<tr>
<th>Styles of Decisionmaking</th>
<th>Reasons to Overrule Precedent</th>
<th>Narrow/Broad Use of Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instrumentalism</td>
<td>Overrule if Wrongly Decided</td>
<td>Narrow Use of Precedent*</td>
</tr>
<tr>
<td>Formalism</td>
<td>But Not if Settled Law</td>
<td></td>
</tr>
<tr>
<td>Holmesian</td>
<td>But Not if Substantial Reliance</td>
<td></td>
</tr>
<tr>
<td>Natural Law</td>
<td>But Not Unless Additional Reason</td>
<td>Broader Use of Precedent**</td>
</tr>
</tbody>
</table>


As a final note, it may be useful to mention the process by which cases get decided. Prior to 1988, the Supreme Court was required to hear appeals from a state Supreme Court where a United States statute was declared invalid or a state statute was upheld. All dispositions were said to be binding precedents.87 Since 1988, under 28 U.S.C. §§ 1253-59, almost all of the Court's jurisdiction is


87 See Hicks v. Miranda, 422 U.S. 332 (1975) (dispositions binding precedent).


See generally Ira P. Robbins, Justice By the Numbers: The Supreme Court and the Rule of Four – Or Is It Five, 36 Suffolk L. Rev. 1 (2002); Edward A. Hartnett, Ties in the Supreme Court of the United States, 44 Wm. & Mary L. Rev. 643 (2002). For lower federal courts, if a judge has completed work on a case, the judge’s vote may count even if the judge dies before the opinion is announced, and even if the judge’s vote is critical for the majority. See Rizo v. Yovino, 887 F.3d 453, 455 n.* (9th Cir. 2018); Montiero v. City of Elizabeth, 436 F.3d 397, 399 n.* (3rd Cir. 2006).

important question of federal law that has not been, but should be, settled by this Court”; or (4) “has
decided an important federal question in a way that conflicts with relevant decisions of this Court.”

The process of deciding a case is described in “Visitor’s Guide to Oral Argument,” available at
that following a grant of certiorari each party files its legal brief so that the Justices are familiar with
the positions each party is advocating. *Amicus curiae* briefs may also be allowed. In most cases,
each party presents an oral argument. The Guide continues by noting the schedule for the usual one-
hour-long argument per case, and that, between arguments, the Justices are busy writing opinions,
deciding which cases to hear in the future, and reading briefs for the next argument sessions. While
for the first couple of decades after the court’s jurisdiction was made substantially discretionary in
1988 the Court decided 100-120 cases each Term, recent practice, as the Guide indicates, is that the
Court grants review in approximately 80 of the 7,000-8,000 petitions filed each Term.

There is no fixed schedule for reaching decisions, but all cases argued during a Term of Court,
which by statute since 1873 has begun in October, and since 1916, as codified at 28 U.S.C. § 2, the
“first Monday in October,” are decided before the summer recess begins, usually the end of June,
except in the rare circumstance of a case held over for the next Term. The Guide continues: “During
an argument week, the Justices meet in a private conference, closed even to staff, to discuss the
cases and to take a preliminary vote on each case. If the Chief Justice is in the majority on a case
decision, he decides who will write the opinion. He may decide to write it himself or he may assign
that duty to any other Justice in the majority. If the Chief Justice is in the minority, the Justice in
the majority who has the most seniority assumes the assignment duty.” Although it was different
in the time of Chief Justice Marshall, who wrote a majority of the Court’s opinions himself, current
practice is that each Justice is assigned roughly the same number of cases to write each Term.92

The conference, although private, has been described by several Justices. See Justice Clark, *The
Supreme Court Conference*, 19 F.R.D. 303 (1956). The Chief Justice handles the order of business,
which can involve: (1) determining which written opinions are ready for announcement, (2)
discussing and voting on cases argued during the week, (3) considering miscellaneous motions, (4)
dealing with certiorari petitions and appeals, and (5) other items, such as Federal Rules or building
items or budget. When dealing with matters requiring a vote, the Chief Justice states his view, and
makes his recommendation. Other Justices comment in order of seniority and a vote is taken.

With respect to the mechanism by which drafts of opinions are circulated, draft opinions are
privately circulated among the Justices until a final draft is agreed upon. When a final decision has
been reached, the Justice who wrote the opinion announces the decision in a public Court session
and may deliver a summary of the Court’s reasoning. Meanwhile, the Public Information Office
releases the full text of the opinion to the public, including posting online. Of course, before the
decision is announced, time is allowed for concurring and dissenting opinions to be drafted.

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92 See Mark V. Tushnet, *Understanding the Rehnquist Court*, 31 Ohio N.U. L. Rev. 197, 201-
02 (2005) (stating that Chief Justice Rehnquist tried to follow a “rather rigid rule” about this).
CHAPTER 3: THE STANDING REQUIREMENT FOR FEDERAL JURISDICTION

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§ 3.1 Introduction to Standing Doctrine

1. Standing as a Justiciability Limit on Federal Court Jurisdiction

As discussed at § 1.2 n.21, Article III, § 1 grants federal judicial power over certain "Cases" and "Controversies." Thus, a threshold question in every federal case is whether plaintiff has made out a “case or controversy” so the court has power to hear the suit. Four judicial doctrines are concerned with this issue, and they are known as justiciability limits. These four are the doctrines of standing, ripeness, mootness, and political questions. Chapter 3 addresses standing doctrine. The other justiciability doctrines are addressed in Chapter 4.

Based upon a predisposition to resolve cases on the merits in order to advance sound social policies, the instrumentalist approach tends to favor finding that the party has standing, the case is ripe, not moot, and does not involve a political question. In contrast, the formalist preference for literal interpretation tends to adopt a more strict interpretation of these doctrines. Based upon a predisposition to defer to government, and thus not challenge the constitutionality of government action, the Holmesian approach is perhaps the most likely to find no standing, the case is not ripe, is moot, or involves a political question. The natural law approach represents a middle between instrumentalism and formalism, without a strong predisposition in either direction, based upon natural law respect for reasoned elaboration of precedents.

2. Standing to Sue: Introduction to Constitutional and Prudential Limits on Federal Jurisdiction

The text of Article III of the Constitution, which provides for federal judicial power over certain "cases" and "controversies," has been held to raise a question for every lawsuit brought in a federal court as to whether plaintiff has made out a case or controversy, so the plaintiff can be said to have "standing" to bring the case in court. Although the case or controversy requirement has existed from the beginning of the Nation, the first case to use the precise term "standing" to describe the issue was Stark v. Wickard in 1944.1

The Court has stated, “[O]ur standing jurisprudence contains two strands: Article III standing, which
enforces the Constitution’s case or controversy requirement, and prudential standing, which
embodies judicially self-imposed limits on the exercise of federal jurisdiction.” To establish
Article III standing, current doctrine requires that plaintiffs must allege (1) a past or prospective
injury in fact to themselves, (2) caused by the challenged action, and (3) likely to be redressed by
a favorable decision. By "injury in fact," the Court means an invasion of a legally protected interest
that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." By "causal" relationship, the Court means that the injury "fairly can be traced to the challenged
action of the defendant," and has not resulted from "the independent action of some third party not
before the court." By redressability, the Court means that the "prospect of obtaining relief from the
injury as a result of a favorable ruling" is not "too speculative."

To be granted standing, the plaintiff must clearly and specifically set forth facts sufficient to satisfy
each of the above requirements. In addition, when assessing a claim of injury, the Court will
presume a lack of jurisdiction unless the contrary appears affirmatively from the record. However,
for the purpose of ruling on a motion to dismiss for want of standing, both trial and reviewing courts
must accept as true all material allegations of the complaint, and must construe it in favor of the
complaining party. When a case has proceeded to final judgment, the facts relating to standing, if
controverted, must be supported by the evidence adduced at trial to avoid dismissal.

Article III standing requirements, and the justiciability requirements of ripeness, mootness, and
political questions, only bind the jurisdiction of federal courts. Each state is free to develop its own
justiciability doctrine for cases heard in state courts. However, Article III does bind the Supreme
Court not only for cases initially brought in the federal courts, but also when reviewing on appeal
the decision of a state court, as held in Doremus v. Board of Education. This can cause a problem

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3 See, e.g., United States v. Hays, 515 U.S. 737, 742-43 (1995); Northeastern Florida Chapter
S. Ct. 1540 (2016) (seemingly rephrasing “injury-in-fact” as (a) “particularized” and (b) “concrete,”
defined as “real” and “not abstract” – which seemingly means not “conjectural or hypothetical.”).
8 Hays, 515 U.S. at 743; Renne v. Geary, 501 U.S. 312, 316 (1991); Warth, 422 U.S. at 501.
if the case were heard in a state court under state standing principles, but the case could not have been brought in federal court under federal standing principles. In theory, such an appeal should not be heard in a federal court since the federal court lacks standing. Nevertheless, where the state court judgment on the claim is adverse to one of the defendants in the state court action, the Court held in *Asarco, Inc. v. Kadish*\(^\text{10}\) that such adverse judgment is itself a form of injury creating Article III standing for defendant-petitioner when none existed before. The Court was concerned that if *Doremus* applied literally, the state court judgment would stand without any federal court review of its accuracy. The problem is not as acute if the state court decision is adverse to plaintiffs, who, because they do not have Article III standing for purposes of having their case heard in federal court, have no real cognizable complaint in federal court about losing the state case anyway. Chief Justice Rehnquist, reflecting a conservative deference-to-state-government predisposition, discussed at § 8.1.1(E) n.30, and formalist Justice Scalia dissented in *Asarco* and would have applied *Doremus* literally to let the state court decision stand without federal review. They noted such unreviewable state court decisions already occur in those states, about 10 in 2014, whose courts have the power to render advisory opinions, unlike the federal courts, as discussed at § 3.3.1 nn.20-23.

Usually it is not difficult to satisfy the three Article III standing requirements if the federal lawsuit is traditional in form, with the plaintiff complaining that the defendant's action, alleged to be unconstitutional on its face or as applied, has caused plaintiff a physical or economic injury redressable by damages or an injunction. Difficulties arise once plaintiffs are outside the classic case of individuals suing for their own physical or economic injuries. Standing may be difficult to establish if the plaintiff complains about non-traditional kinds of injuries; or not as an injured individual but as a member of some large group, such as taxpayers or citizens; or as an individual or organization distressed by actual or threatened law enforcement directed at a third person; or more remote from personal injury, as an individual simply experiencing distress at observing an alleged constitutional violation.\(^\text{11}\) Problems are also raised by the federal *Qui Tam* statute, 31 U.S.C. § 3730, which allows private persons to bring actions on behalf of the United States.\(^\text{12}\)

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\(^{10}\) 490 U.S. 605, 612-24 (1989); id. at 634-37 (Rehnquist, C.J., joined by Scalia, J., concurring in part and dissenting in part).


\(^{12}\) *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989). The *Qui Tam* statute raises questions of constitutionality because the plaintiff ordinarily will have no way of showing a personal injury in fact. However, plaintiffs in a *qui tam* action are usually held to have standing, as in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000). The Court said that the law can be interpreted as a partial assignment of the government’s damages claim to the plaintiff, giving rise to “representational standing.”
These difficulties frame the two central questions of modern standing doctrine: (1) how difficult should it be to establish standing in the non-traditional kinds of cases, and (2) whether the difficulties which arise in these cases are constitutional difficulties mandated by Article III, which Congress could not alter by statute under the doctrines of Marbury and Klein, or merely prudential difficulties that can be overcome by acts of Congress that grant standing under Congress’ Ex parte McCardle power to make regulations regarding federal court jurisdiction. In the 1970s, in cases like Warth v. Seldin, the Court said that in these situations it might invoke a nonconstitutional "prudential" limitation on standing to sue because a harm shared equally by a large class of citizens was regarded by the Court as a "generalized grievance" which for prudential reasons usually did not warrant exercise of federal jurisdiction. Since the 1980s, however, in cases like Allen v. Wright, excerpted at § 3.2, and Lujan v. Defenders of Wildlife, excerpted at § 3.2, the Court has stated that plaintiffs who raise only generalized grievances about government do not state an Article III case or controversy. On the other hand, even under an Article III analysis, the Court noted in Massachusetts v. Environmental Protection Agency (EPA), excerpted at § 3.2, that the Court will pay attention to Congress’ views on injury and causation, stating, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”

§ 3.2 Article III Standing Doctrine: Injury, Causation, and Redressability

Allen v. Wright

Justice O’CONNOR delivered the opinion of the Court.

Parents of black public school children allege in this nation-wide class action that the Internal Revenue Service (IRS) has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. They assert that the IRS thereby harms them directly and interferes with the ability of their children to receive an education in desegregated public schools. The issue before us is whether plaintiffs have standing to bring this suit. We hold that they do not.

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Seldin, supra, 422 U.S. [490, 498 (1975)].

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. See Valley Forge [Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982)]. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. 454 U.S., at 472.

Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, “'distinct and palpable,'” Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, supra, 422 U.S., at 501), and not “abstract” or “conjectural” or “hypothetical,” Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974). The injury must be “fairly” traceable to the challenged action, and relief from the injury must be “likely” to follow from a favorable decision. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. [26, 38, 41 (1976)].

Respondents allege two injuries in their complaint to support their standing to bring this lawsuit. First, they say that they are harmed directly by the mere fact of Government financial aid to discriminatory private schools. Second, they say that the federal tax exemptions to racially discriminatory private schools in their communities impair their ability to have their public schools desegregated.

We conclude that neither suffices to support respondents' standing. The first fails under clear precedents of this Court because it does not constitute judicially cognizable injury. The second fails because the alleged injury is not fairly traceable to the assertedly unlawful conduct of the IRS.

Respondents' first claim of injury can be interpreted in two ways. It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race. Under neither interpretation is this claim of injury judicially cognizable.

This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. In Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), for example, the Court rejected a claim of citizen standing to challenge Armed Forces Reserve commissions held by Members of Congress as violating the Incompatibility Clause of Art. I, § 6, of the Constitution. As citizens, the Court held, plaintiffs alleged nothing but “the abstract injury in nonobservance of the Constitution. . . .” Id., at 223, n.13. More recently, in Valley Forge, supra, we rejected a claim of standing to challenge a Government conveyance of property to a religious institution. Insofar as the plaintiffs relied simply on “‘their shared individuated right’” to a Government that made no law respecting an establishment
of religion, id., 454 U.S., at 482 (quoting Americans United v. U.S. Dept. of HEW, 619 F.2d 252, 261 (CA3 1980)), we held that plaintiffs had not alleged a judicially cognizable injury. “[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.” 454 U.S., at 483. See also United States v. Richardson, 418 U.S. 166 (1974); Laird v. Tatum, 408 U.S. 1 (1972); Ex parte Lévitt, 302 U.S. 633 (1937). Respondents here have no standing to complain simply that their Government is violating the law.

The consequences of recognizing respondents' standing on the basis of their first claim of injury illustrate why our cases plainly hold that such injury is not judicially cognizable. If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into “no more than a vehicle for the vindication of the value interests of concerned bystanders.” United States v. SCRAP, 412 U.S. 669, 687 (1973).

It is in their complaint's second claim of injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances. The injury they identify – their children's diminished ability to receive an education in a racially integrated school – is, beyond any doubt, not only judicially cognizable but, as shown by cases from Brown v. Board of Education, 347 U.S. 483 (1954), to Bob Jones University v. United States, 461 U.S. 574 (1983) [Ed.: which held that the IRS can deny tax-exempt status to a racially discriminatory school, even a religiously-affiliated school, without offending the Establishment Clause], one of the most serious injuries recognized in our legal system. Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it unless standing requirements are met. In this case, respondents' second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.

The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and “results from the independent action of some third party not before the court,” Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S., at 42. As the Court pointed out in Warth v. Seldin, 422 U.S., at 505 “the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III. . . .”

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation. It is, first, uncertain how many racially discriminatory private schools are in fact
receiving tax exemptions. Moreover, it is entirely speculative, as respondents themselves conceded in the Court of Appeals, whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. See 480 F.Supp., at 796. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing. In Simon v. Eastern Kentucky Welfare Rights Org., supra, the Court held that standing to challenge a Government grant of a tax exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals' policy concerning the provision of medical services to indigents. The causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action. 426 U.S., at 40-46. The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

Justice MARSHALL took no part in the decision of these cases.

Justice BRENNAN, dissenting.

The Court acknowledges that this alleged injury is sufficient to satisfy constitutional standards. It does so only grudgingly, however, without emphasizing the significance of the harm alleged. Nonetheless, we have consistently recognized throughout the last 30 years that the deprivation of a child's right to receive an education in a desegregated school is a harm of special significance; surely, it satisfies any constitutional requirement of injury in fact. Just last Term in Bob Jones University v. United States, for example, we acknowledged that “[a]n unbroken line of cases following Brown v. Board of Education establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.” 461 U.S., at 593 (1983) (emphasis added). See Gilmore v. City of Montgomery, 417 U.S. 556, 568 (1974) (“[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly . . . , nor nullified indirectly . . . through evasive schemes for segregation whether attempted ‘ingeniously or ingenuously.’”) (quoting Cooper v. Aaron, 358 U.S. 1, 17 (1958)); Norwood v. Harrison, 413 U.S. 455, 468–469 (1973).

Viewed in light of the injuries they claim, the respondents have alleged a direct causal relationship between the Government action they challenge and the injury they suffer: their inability to receive
an education in a racially integrated school is directly and adversely affected by the tax-exempt status granted by the IRS to racially discriminatory schools in their respective school districts. Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools.

The Court admits that “[t]he diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions . . . if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration,” but concludes that “[r]espondents have made no such allegation.” With all due respect, the Court has either misread the complaint or is improperly requiring the respondents to prove their case on the merits in order to defeat a motion to dismiss. For example, the respondents specifically refer by name to at least 32 private schools that discriminate on the basis of race and yet continue to benefit illegally from tax-exempt status. Eighteen of those schools – including at least 14 elementary schools, 2 junior high schools, and 1 high school – are located in the city of Memphis, Tenn., which has been the subject of several court orders to desegregate. See Complaint ¶¶ 24-27, 45, App. 26-27, 35-36. Similarly, the respondents cite two private schools in Orangeburg, S.C. that continue to benefit from federal tax exemptions even though they practice race discrimination in school districts that are desegregating pursuant to judicial and administrative orders. See Complaint ¶¶ 29, 46, App. 28, 36. At least with respect to these school districts, as well as the others specifically mentioned in the complaint, there can be little doubt that the respondents have identified communities containing “enough racially discriminatory private schools receiving tax exemptions . . . to make an appreciable difference in public school integration.”

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

“Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.” Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983) (footnote omitted).

The purpose of this scheme, like the purpose of any subsidy, is to promote the activity subsidized; the statutes “seek to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits.” Bob Jones University v. United States, 461 U.S. 574, 587, n.10 (1983). If the granting of preferential tax treatment would “encourage” private segregated schools to conduct their “charitable” activities, it must follow that the withdrawal of the treatment would “discourage” them, and hence promote the process of desegregation.

This causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased. Sections 170 and 501(c)(3) [the federal statutes the IRS is alleged not to have sufficiently followed here] are premised on that recognition. If racially discriminatory private schools lose the “cash grants” that flow from the
operation of the statutes, the education they provide will become more expensive and hence less of their services will be purchased. Conversely, maintenance of these tax benefits makes an education in segregated private schools relatively more attractive, by decreasing its cost. Accordingly, without tax-exempt status, private schools will either not be competitive in terms of cost, or have to change their admissions policies, hence reducing their competitiveness for parents seeking “a racially segregated alternative” to public schools, which is what respondents have alleged many white parents in desegregating school districts seek.

Although the parties were denied standing in Allen v. Wright, the visibility of the IRS practices highlighted in the case, and the public and political pressure which ensued, caused the Reagan-era IRS to change their internal decisionmaking, which previously had granted tax-exempt status as long as the school had adopted and certified a policy of racial nondiscrimination, without testing whether or not that policy was fully implemented in practice.

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Lujan v. Defenders of Wildlife
504 U.S. 555 (1992)

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part III-B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and particularized, see Warth v. Seldin, 422 U.S. 490, 508 (1975); and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” Whitmore, supra, 495 U.S., at 155 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” Id., at 38, 43.

The party invoking federal jurisdiction bears the burden of establishing these elements. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990); Warth, supra, 422 U.S., at 508. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of
proof, \textit{i.e.}, with the manner and degree of evidence required at the successive stages of the litigation. See Lujan v. National Wildlife Federation, 497 U.S. 871, 883-889 (1990); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114-115, and n.31 (1979); Simon, supra, 426 U.S., at 45, n. 25; Warth, supra, 422 U.S., at 527, and n.6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we “presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” National Wildlife Federation, supra, 497 U.S., at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such “mere allegations,” but must “set forth” by affidavit or other evidence “specific facts,” Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be “supported adequately by the evidence adduced at trial.” \textit{Gladstone, supra, 441 U.S.}, at 115, n.31.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one or more of the essential elements of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see also Simon, supra, 426 U.S., at 41-42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. E.g., Warth, supra, 422 U.S., at 505. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily “substantially more difficult” to establish. Allen, supra, 468 U.S., at 758; Simon, supra, 426 U.S., at 44-45; Warth, supra, 422 U.S., at 505.

III
A

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad “increas[es] the rate of extinction of endangered and threatened species.” \textit{Complaint ¶ 5, App. 13}. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. See, e.g., Sierra Club v. Morton, 405 U.S., at 734. “But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It
requires that the party seeking review be himself among the injured.” Id., at 734-735. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be “directly” affected apart from their “‘special interest' in th[e] subject.” Id., at 735, 739.

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members – Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and “observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,” and that she “will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop [ing] . . . Egypt's . . . Master Water Plan.” App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and “observed the habitat” of “endangered species such as the Asian elephant and the leopard” at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she “was unable to see any of the endangered species”; “this development project,” she continued, “will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [which] may severely shorten the future of these species”; that threat, she concluded, harmed her because she “intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.” Id., at 145-146. When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that “I intend to go back to Sri Lanka,” but confessed that she had no current plans: “I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future.” Id., at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species – though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce “imminent” injury to Mses. Kelly and Skilbred. That the women “had visited” the areas of the projects before the projects commenced proves nothing. As we have said in a related context, “‘Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.’ ” Lyons, 461 U.S., at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974)). And the affiants' profession of an “inten[t]” to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such “some day” intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the “actual or imminent” injury that our cases require.

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled “ecosystem nexus,” proposes that any person who uses any part of a “contiguous ecosystem” adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in National Wildlife Federation, which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly “in the vicinity” of it. 497 U.S., at 887-889; see also Sierra Club, 405 U.S.,
at 735. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the “animal nexus” approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the “vocational nexus” approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not “an ingenious academic exercise in the conceivable,” United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible – though it goes to the outermost limit of plausibility – to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, see Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 231, n.4 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, “suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication.” Allen, 468 U.S., at 759-760.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question.
A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in Simon, 426 U.S., at 43-44, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.

IV

The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Warth, 422 U.S., at 500 (quoting Linda R. S. v. Richard D., 410 U.S. 614, 617, n.3 (1973)). As we said in Sierra Club “[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738.

Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations. I agree with the Court's conclusion in Part III-A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." Sierra Club v. Morton, 405 U.S. 727, 735 (1972). This component of the standing inquiry is not satisfied unless “[p]laintiffs . . . demonstrate a 'personal stake in the outcome.' . . . Abstract injury is not enough. The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’ ” Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (citations omitted).

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see Sierra Club v. Morton, supra, 405 U.S., at 735 n.8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus,"
“animal nexus,” and “vocational nexus” theories, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 231 n.4 (1986) (“[R]espondents ... undoubtedly have alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting”).

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III-B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. See Warth v. Seldin, 422 U.S. 490, 500 (1975). In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on “any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter,” it does not of its own force establish that there is an injury in “any person” by virtue of any “violation.” 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that “the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.
An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated.

Justice STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not “imminent.” Nor do I agree with the plurality's additional conclusion that respondents' injury is not “redressable” in this litigation.

In my opinion a person who has visited the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of “aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting.

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a “genuine issue” of material fact as to standing. Fed. Rule Civ. Proc. 56(c). This is not a heavy burden. A “genuine issue” exists so long as “the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents].” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). This Court's “function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. at 249.

The Court never mentions the “genuine issue” standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, “affidavits or other evidence showing, through specific facts” the existence of injury. The Court thereby confuses respondents' evidentiary burden (i.e., affidavits asserting “specific facts”) in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (i.e., the existence of a “genuine issue” of “material fact”) under Rule 56(c).

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects.
I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the “actual or imminent” injury standard. The Court dismisses Kelly's and Skilbred's general statements that they intended to revisit the project sites as “simply not enough. But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits “prov[e] nothing,” the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (“Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury”) (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation also make it likely – at least far more likely than for the average citizen – that they would choose to visit these areas of the world where species are vanishing.

The second redressability obstacle relied on by the plurality is that “the [action] agencies generally supply only a fraction of the funding for a foreign project. What this Court might “generally” take to be true does not eliminate the existence of a genuine issue of fact to withstand summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

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Today, there are virtually no nile crocodiles north of the Aswan Dam, although they continue to flourish throughout sub-Saharan Africa. The project in Sri Lanka was delayed in the context of a 25-year civil war, finally resolved brutally by the Sri Lankan military defeating the minority ethnic Tamil Tigers in 2009. Projects around the world, from Sri Lanka, to Malaysia and Indonesia, to the Amazon in Brazil, continue to diminish rain forests causing extinctions of thousands of species of plants and animals each year.

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**Massachusetts v. Environmental Protection Agency (EPA)**

549 U.S. 497 (2007)

Justice STEVENS delivered the opinion of the Court.

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species – the most important species – of a "greenhouse gas."
Calling global warming "the most pressing environmental challenge of our time," a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that we may not address those two questions unless at least one petitioner has standing to invoke our jurisdiction under Article III of the Constitution. Notwithstanding the serious character of that jurisdictional argument and the absence of any conflicting decisions construing § 202(a)(1), the unusual importance of the underlying issue persuaded us to grant the writ.

IV

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." Those two words confine "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." Flast v. Cohen, 392 U.S. 83, 95 (1968). It is therefore familiar learning that no justiciable "controversy" exists when parties seek adjudication of a political question, Luther v. Borden, 48 U.S. 1, 7 How. 1 (1849), when they ask for an advisory opinion, Hayburn's Case, 2 U.S. 409, 2 Dall. 409 (1792), see also Clinton v. Jones, 520 U.S. 681, 700, n.33 (1997), or when the question sought to be adjudicated has been mooted by subsequent developments, California v. San Pablo & Tulare R. Co., 149 U.S. 308 (1893). This case suffers from none of these defects.

The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. See 42 U.S.C. § 7607(b)(1). That authorization is of critical importance to the standing inquiry: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Lujan, 504 U.S., at 580 (Kennedy, J., concurring in part and concurring in judgment). "In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." Ibid. We will not, therefore, "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." Id., at 581.

EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Baker v. Carr, 369 U.S. 186, 204 (1962). As Justice Kennedy explained in his Lujan concurrence: "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the
vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." 504 U.S., at 581 (internal quotation marks omitted).

To ensure the proper adversarial presentation, Lujan holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. See id., at 560-561. However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests," id., at 572, n.7 – here, the right to challenge agency action unlawfully withheld, § 7607(b)(1) – "can assert that right without meeting all the normal standards for redressability and immediacy," ibid. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. Ibid.; see also Sugar Cane Growers Cooperative of Fla. v. Veneman, 289 F.3d 89, 94-95 (CADC 2002) ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.").

Only one of the petitioners needs to have standing to permit us to consider the petition for review. See Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 52, n.2 [(2006)]. We stress here, as did Judge Tatel below, the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in Lujan, a private individual.

Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction. As Justice Holmes explained in Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), a case in which Georgia sought to protect its citizens from air pollution originating outside its borders: "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. . . ."

Just as Georgia's independent interest "in all the earth and air within its domain" supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today. Cf. Alden v. Maine, 527 U.S. 706, 715 (1999) (observing that in the federal system, the States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty"). That Massachusetts does in fact own a great deal of the "territory alleged to be affected" only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.
When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982) ("One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue parens patriae is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers").

These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis. [FN 17: The Chief Justice accuses the Court of misreading Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), see post, at 3-4 (dissenting opinion), and "devising a new doctrine of state standing," id., at 15. But no less an authority than Hart & Wechsler's The Federal Courts and the Federal System understands Tennessee Copper as a standing decision. R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 290 (5th ed. 2003). Indeed, it devotes an entire section to chronicling the long development of cases permitting States "to litigate as parens patriae to protect quasi-sovereign interests – i.e., public or governmental interests that concern the state as a whole." Id., at 289; see, e.g., Missouri v. Illinois, 180 U.S. 208, 240-241 (1901) (finding federal jurisdiction appropriate not only "in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state," but also when the "substantial impairment of the health and prosperity of the towns and cities of the state" are at stake).]

With that in mind, it is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent." Lujan, 504 U.S., at 560 (internal quotation marks omitted).

The Injury

The harms associated with climate change are serious and well recognized. Indeed, the NRC Report itself – which EPA regards as an "objective and independent assessment of the relevant science," 68 Fed. Reg. 52930 – identifies a number of environmental changes that have already inflicted significant harms, including "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years . . . ." NRC Report 16.
Causation

EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.

EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.

But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.

And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere – according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. ¶ 30, Stdg. App. 219. That accounts for more than 6% of worldwide carbon dioxide emissions. Id., at 232 (Oppenheimer Decl. ¶ 3); see also MacCracken Decl. ¶ 31, at 220. To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China. Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.

The Remedy

While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. See also Larson v. Valente, 456 U.S. 228, 244, n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury"). Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes
for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

We moreover attach considerable significance to EPA's "agreement with the President that 'we must address the issue of global climate change,'" 68 Fed. Reg. 52929 (quoting remarks announcing Clear Skies and Global Climate Initiatives, 2002 Public Papers of George W. Bush, Vol. 1, Feb. 14, p. 227 (2004)), and to EPA's ardent support for various voluntary emission-reduction programs, 68 Fed. Reg. 52932. As Judge Tatel observed in dissent below, "EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming." 415 F.3d at 66.

In sum – at least according to petitioners' uncontested affidavits – the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition.

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.

Global warming may be a "crisis," even "the most pressing environmental problem of our time." Pet. for Cert. 26, 22. Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.

Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government's alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here "is the function of Congress and the Chief Executive," not the federal courts. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992). I would vacate the judgment below and remand for dismissal of the petitions for review.

I

Our modern framework for addressing standing is familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." DaimlerChrysler, supra, 126 S. Ct. 1854 (slip op., at 6) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984) (internal quotation marks omitted)). Applying that standard here,
petitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency's failure to promulgate new motor vehicle greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.

Before determining whether petitioners can meet this familiar test, however, the Court changes the rules. It asserts that "States are not normal litigants for the purposes of invoking federal jurisdiction," and that given "Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solici
tude in our standing analysis."

Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such "special solici
tude" is conspicuously absent from the Court's opinion. The general judicial review provision cited by the Court, 42 U.S.C. § 7607(b)(1), affords States no special rights or status. The Court states that "Congress has ordered EPA to protect Massachusetts (among others)" through the statutory provision at issue, § 7521(a)(1), and that "Congress has . . . recognized a concomitant procedual right to challenge the rejection of its rulemaking petition as arbitrary and capricious." The reader might think from this unfortunate phrasing that Congress said something about the rights of States in this particular provision of the statute. Congress knows how to do that when it wants to, see, e.g.,§ 7426(b) (affording States the right to petition EPA to directly regulate certain sources of pollution), but it has done nothing of the sort here. [Here], Congress treated public and private litigants exactly the same.

Nor does the case law cited by the Court provide any support for the notion that Article III somehow implicitly treats public and private litigants differently. The Court has to go back a full century in an attempt to justify its novel standing rule, but even there it comes up short. The Court's analysis hinges on Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) – a case that did indeed draw a distinction between a State and private litigants, but solely with respect to available remedies. The case had nothing to do with Article III standing.

In Tennessee Copper, the State of Georgia sought to enjoin copper companies in neighboring Tennessee from discharging pollutants that were inflicting "a wholesale destruction of forests, orchards and crops" in bordering Georgia counties. Id., at 236. Although the State owned very little of the territory allegedly affected, the Court reasoned that Georgia – in its capacity as a "quasi-sovereign" -- "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." Id., at 237. The Court explained that while "the very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief [were] wanting," a State "is not lightly to be required to give up quasi-sovereign rights for pay." Ibid. Thus while a complaining private litigant would have to make do with a legal remedy – one "for pay" – the State was entitled to equitable relief. See id., at 237-238.

In contrast to the present case, there was no question in Tennessee Copper about Article III injury. See id., at 238-239. There was certainly no suggestion that the State could show standing where the private parties could not; there was no dispute, after all, that the private landowners had "an action at law." Id., at 238. Tennessee Copper has since stood for nothing more than a State's right, in an original jurisdiction action, to sue in a representative capacity as parens patriae. See, e.g., Maryland
v. Louisiana, 451 U.S. 725, 737 (1981). Nothing about a State's ability to sue in that capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III.

A claim of parens patriae standing is distinct from an allegation of direct injury. See Wyoming v. Oklahoma, 502 U.S. 437, 448-449 (1992). Far from being a substitute for Article III injury, parens patriae actions raise an additional hurdle for a state litigant: the articulation of a "quasi-sovereign interest" "apart from the interests of particular private parties." Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982) (emphasis added). Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as parens patriae must still show that its citizens satisfy Article III. Focusing on Massachusetts's interests as quasi-sovereign makes the required showing here harder, not easier. The Court, in effect, takes what has always been regarded as a necessary condition for parens patriae standing – a quasi-sovereign interest – and converts it into a sufficient showing for purposes of Article III.

What is more, the Court's reasoning falters on its own terms. The Court asserts that Massachusetts is entitled to "special solicitude" due to its "quasi-sovereign interests," but then applies our Article III standing test to the asserted injury of the State's loss of coastal property. In the context of parens patriae standing, however, we have characterized state ownership of land as a "nonsovereign interest" because a State "is likely to have the same interests as other similarly situated proprietors." Alfred L. Snapp & Son, supra, at 601.

On top of everything else, the Court overlooks the fact that our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest – as opposed to a direct injury – against the Federal Government. As a general rule, we have held that while a State might assert a quasi-sovereign right as parens patriae "for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and no the State, which represents them." Massachusetts v. Mellon, 262 U.S. 447, 485-486 (1923) (citation omitted); see also Alfred L. Snapp & Son, supra, at 610, n.16.

All of this presumably explains why petitioners never cited Tennessee Copper in their briefs before this Court or the D.C. Circuit. It presumably explains why not one of the legion of amici supporting petitioners ever cited the case. And it presumably explains why not one of the three judges writing below ever cited the case either. Given that one purpose of the standing requirement is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination," ante, at 13-14 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)), it is ironic that the Court today adopts a new theory of Article III standing for States without the benefit of briefing or argument on the point.

II

It is not at all clear how the Court's "special solicitude" for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability.
When the Court actually applies the three-part test, it focuses, as did the dissent below, see 367 U.S. App. D.C. 282, 415 F.3d 50, 64 (CADC 2005) (opinion of Tatel, J.), on the State's asserted loss of coastal land as the injury in fact. If petitioners rely on loss of land as the Article III injury, however, they must ground the rest of the standing analysis in that specific injury.

If petitioners' particularized injury is loss of coastal land, it is also that injury that must be "actual or imminent, not conjectural or hypothetical," Defenders of Wildlife, supra, at 560 (internal quotation marks omitted), "real and immediate," Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal quotation marks omitted), and "certainly impending," Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal quotation marks omitted).

As to "actual" injury, the Court observes that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming" and that "these rising seas have already begun to swallow Massachusetts' coastal land." But none of petitioners' declarations supports that connection. One declaration states that "a rise in sea level due to climate change is occurring on the coast of Massachusetts, in the metropolitan Boston area," but there is no elaboration. Petitioners' Standing Appendix in No. 03-1361, etc. (CADC), p. 196 (Stdg. App.). And the declarant goes on to identify a "significant" non-global-warming cause of Boston's rising sea level: land subsidence. Id., at 197; see also id., at 216. Thus, aside from a single conclusory statement, there is nothing in petitioners' 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases. It is pure conjecture.

The Court's attempts to identify "imminent" or "certainly impending" loss of Massachusetts coastal land fares no better. One of petitioners' declarants predicts global warming will cause sea level to rise by 20 to 70 centimeters by the year 2100. Stdg. App. 216. Another uses a computer modeling program to map the Commonwealth's coastal land and its current elevation, and calculates that the high-end estimate of sea level rise would result in the loss of significant state-owned coastal land. Id., at 179. But the computer modeling program has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters. Id., at 177-178. As an initial matter, if it is possible that the model underrepresents the elevation of coastal land to an extent equal to or in excess of the projected sea level rise, it is difficult to put much stock in the predicted loss of land. But even placing that problem to the side, accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless. See Defenders of Wildlife, supra, at 565, n.2 (while the concept of "'imminence'" in standing doctrine is "somewhat elastic," it can be "stretched beyond the breaking point"). "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." Whitmore, supra, at 158 (internal quotation marks omitted; emphasis added).

III

Petitioners' reliance on Massachusetts's loss of coastal land as their injury in fact for standing purposes creates insurmountable problems for them with respect to causation and redressability. To
establish standing, petitioners must show a causal connection between that specific injury and the lack of new motor vehicle greenhouse gas emission standards, and that the promulgation of such standards would likely redress that injury. As is often the case, the questions of causation and redressability overlap. See Allen, 468 U.S., at 753, n.19 (observing that the two requirements were "initially articulated by this Court as two facets of a single causation requirement" (internal quotation marks omitted)). And importantly, when a party is challenging the Government's allegedly unlawful regulation, or lack of regulation, of a third party, satisfying the causation and redressability requirements becomes "substantially more difficult." Defenders of Wildlife, supra, at 562 (internal quotation marks omitted); see also Warth, supra, at 504-505.

Petitioners view the relationship between their injuries and EPA's failure to promulgate new motor vehicle greenhouse gas emission standards as simple and direct: Domestic motor vehicles emit carbon dioxide and other greenhouse gases. Worldwide emissions of greenhouse gases contribute to global warming and therefore also to petitioners' alleged injuries. Without the new vehicle standards, greenhouse gas emissions – and therefore global warming and its attendant harms – have been higher than they otherwise would have been; once EPA changes course, the trend will be reversed.

The Court ignores the complexities of global warming, and does so by now disregarding the "particularized" injury it relied on in step one, and using the dire nature of global warming itself as a bootstrap for finding causation and redressability. First, it is important to recognize the extent of the emissions at issue here. Because local greenhouse gas emissions disperse throughout the atmosphere and remain there for anywhere from 50 to 200 years, it is global emissions data that are relevant. See App. to Pet. for Cert. A-73. According to one of petitioners' declarations, domestic motor vehicles contribute about 6 percent of global carbon dioxide emissions and 4 percent of global greenhouse gas emissions. Stdg. App. 232. The amount of global emissions at issue here is smaller still; § 202(a)(1) of the Clean Air Act covers only new motor vehicles and new motor vehicle engines, so petitioners' desired emission standards might reduce only a fraction of 4 percent of global emissions.

This gets us only to the relevant greenhouse gas emissions; linking them to global warming and ultimately to petitioners' alleged injuries next requires consideration of further complexities. As EPA explained in its denial of petitioners' request for rulemaking, "predicting future climate change necessarily involves a complex web of economic and physical factors including: our ability to predict future global anthropogenic emissions of [greenhouse gases] and aerosols; the fate of these emissions once they enter the atmosphere (e.g., what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (e.g., changes in cloud cover and ocean circulation); changes in temperature characteristics (e.g., average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (e.g., shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (e.g., increases or decreases in agricultural productivity, human health impacts)." App. to Pet. for Cert. A-83 through A-84.
Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury – the loss of Massachusetts coastal land – the connection is far too speculative to establish causation.

IV

Redressability is even more problematic. To the tenuous link between petitioners' alleged injury and the indeterminate fractional domestic emissions at issue here, add the fact that petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States. As the Court acknowledges, "developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century," ante, at 23, so the domestic emissions at issue here may become an increasingly marginal portion of global emissions, and any decreases produced by petitioners' desired standards are likely to be overwhelmed many times over by emissions increases elsewhere in the world.

Petitioners offer declarations attempting to address this uncertainty, contending that "if the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program." Stdg. App. 220; see also id., at 311-312. In other words, do not worry that other countries will contribute far more to global warming than will U.S. automobile emissions; someone is bound to invent something, and places like the People's Republic of China or India will surely require use of the new technology, regardless of cost. The Court previously has explained that when the existence of an element of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," a party must present facts supporting an assertion that the actor will proceed in such a manner. Defenders of Wildlife, 504 U.S., at 562 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.) (internal quotation marks omitted). The declarations' conclusory (not to say fanciful) statements do not even come close.

No matter, the Court reasons, because any decrease in domestic emissions will "slow the pace of global emissions increases, no matter what happens elsewhere." Every little bit helps, so Massachusetts can sue over any little bit.

The Court's sleight-of-hand is in failing to link up the different elements of the three-part standing test. What must be likely to be redressed is the particular injury in fact. The injury the Court looks to is the asserted loss of land. The Court contends that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, and therefore redress Massachusetts's injury. But even if regulation does reduce emissions – to some indeterminate degree, given events elsewhere in the world – the Court never explains why that makes it likely that the injury in fact – the loss of land – will be redressed. Schoolchildren know that a kingdom might be lost "all for the want of a horseshoe nail," but "likely" redressability is a different matter. The realities make it pure conjecture to suppose
that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land.

V

Today's decision recalls the previous high-water mark of diluted standing requirements, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). *SCRAP* involved "probably the most attenuated injury conferring Art. III standing" and "surely went to the very outer limit of the law" – until today. Whitmore, 495 U.S., at 158-159; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990) (*SCRAP* "has never since been emulated by this Court"). In *SCRAP*, the Court based an environmental group's standing to challenge a railroad freight rate surcharge on the group's allegation that increases in railroad rates would cause an increase in the use of nonrecyclable goods, resulting in the increased need for natural resources to produce such goods. According to the group, some of these resources might be taken from the Washington area, resulting in increased refuse that might find its way into area parks, harming the group's members. 412 U.S., at 688.

Over time, *SCRAP* became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint. *SCRAP* made standing seem a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches. Today's decision is *SCRAP* for a new generation.

Perhaps the Court recognizes as much. How else to explain its need to devise a new doctrine of state standing to support its result? The good news is that the Court's "special solicitude" for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court's self-professed relaxation of those Article III requirements has caused us to transgress "the proper – and properly limited – role of the courts in a democratic society." Allen, 468 U.S., at 750 (internal quotation marks omitted).

New EPA regulations regarding greenhouse gases, developed in response to this case, were substantially upheld in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (Regulations regarding greenhouse gases for sources already regulated for conventional pollutants, which covers over 95% of regulated sources, are valid, but unreasonable to assert statutory authority to apply regulations to new sources solely on basis of greenhouse gas emissions).

§ 3.3 Historical Eras of Article III Standing Doctrine

1. The Original Natural Law Era: 1789-1873

The traditional natural law approach toward justiciability issues began with the natural law premise that where there is a wrong, there must be a remedy. As stated by Chief Justice John Marshall in
"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." As Justice Marshall continued in *Marbury*, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Curbing the impact of these observations is the doctrine of separation of powers. Referring to the possibility of courts meddling with executive prerogatives, Marshall said in *Marbury*, "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." These principles sustain a standing doctrine that seeks to accommodate the duty of courts to provide a remedy for injuries with the need to avoid interference with other branches. Justice O'Connor wrote for the Court in 1984, "[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers."

On separation of powers grounds, early Supreme Court decisions rejected the practice of rendering advisory opinions. The first such case to so hold was *Hayburn’s Case*, decided in 1792. One year later, Chief Justice Jay, and the Associate Justices, sent a letter to President Washington's Secretary of State, Thomas Jefferson, confirming the view that federal courts may not give advisory opinions:

> [T]he lines of separation [are] drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges in a court of the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions [previously asked], especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.

In addition to this separation of powers argument, a concern with shielding judges from the charge of bias was also noted by a number of framers and ratifiers of the Constitution as supporting a ban on federal judges rendering advisory opinions. The charge of bias might result if judges were to decide on the constitutionality of legislation after having rendered an advisory opinion on that

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17 5 U.S. (1 Cranch) 137, 163 (1803).
18 *Id.* at 170.
20 2 U.S. (2 Dall.) 409 (1792).
matter. Thus, in this instance, concerns regarding separation of powers and the appropriate role of the Court in our constitutional design triumphed over a broader view of standing reflected in customary English common law practice. As the Supreme Court has noted, the English practice at the time of the Constitution permitted English courts to render advisory opinions.  

2. The Formalist Era: 1873-1937

During the formalist era, between 1873 and 1937, the Court continued to articulate the concept of standing in terms of the customary meaning of "cases and controversies" found in judicial precedents, including those of England, while acknowledging a separation of powers base to standing doctrine. While the language of the cases did not foreclose a broad view of standing, the specific case results did not evince much support for an expansive view of standing. For example, in 1921, the Court denied standing in Fairchild v. Hughes, which involved a claim by a citizen that the 19th Amendment should be declared void as not ratified according to proper procedures. The Court noted that the common law does not entitle one to sue "to secure a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid."

The most notable case on standing from the formalist era was the 1923 case of Frothingham v. Mellon. The State of Massachusetts and Mrs. Frothingham challenged the federal Maternity Act. It granted money to states if they consented to federal conditions attached to the grants. The Court said Massachusetts suffered no injury since the federal law "simply extends an option which the State is free to accept or reject." Thus, the claim involved only "abstract questions of political power, of sovereignty, of government." Regarding Mrs. Frothingham's standing as an injured taxpayer, the Court stated: "Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

See Flast v. Cohen, 392 U.S. 83, 96 (1968). This Article III ban only applies to the federal courts. Under a few state provisions, such as in Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota in their state Constitutions, and in Alabama, Delaware, and Oklahoma (only for death penalty cases) by state statute, some state Supreme Courts have power to issue advisory opinions. See Helen Hershkoff, State Courts and the "Passive Virtues:" Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1844-52 (2001). So do many constitutional courts in other countries and courts created pursuant to international treaties. See Jo M. Pasqualucci, Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law, 38 Stan. J. Int’l L. 241, 245-49 (2002).

24  258 U.S. 126, 129 (1921).


26  Id. at 488-89.
also noted, "Her interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 27

3. The Holmesian Era: 1937-1954

The limited view of standing suggested in Frothingham was developed further by the Supreme Court between 1937 and 1954. During this period, the Court for the first time began to articulate standing doctrine in terms of the requirement of a "distinct injury."

The requirement of a direct or distinct injury became the explicit reason for denying a taxpayer standing in the 1952 case of Doremus v. Board of Education. 28 The Court stated, "Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is imminently in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'"

Because of its posture of deference to government, the Holmesian way of phrasing the first central issue of standing, that is, how difficult should it be to establish standing in non-traditional kinds of cases, tends to put higher barriers in the way of a litigant suing the government than does a natural law or formalist approach. For example, rather than requiring that it be "likely" an injury will occur, Justice Rehnquist said in Whitmore v. Arkansas 29 that a "threatened injury must be 'certainly impending' to constitute injury in fact." Trying to create a longer pedigree for his newly-minted requirement that the injury be "certainly impending," Justice Rehnquist noted in Whitmore that the phrase "certainly impending" had been used in an old formalist-era case, Pennsylvania v. West Virginia. 30 In that 1923 case, however, the Court merely found that the plaintiffs could easily meet the standing requirement because their injury was, in fact, "certainly impending." The Court did not require in Pennsylvania that an injury had to be "certainly impending" for standing to be found. 31 The cite in Whitmore to Pennsylvania thus appears to be an attempt by Justice Rehnquist to support a higher standard of injury with a precedent that does not lend itself to such support. Nonetheless,

27 Id. at 487.


30 262 U.S. at 593.

31 Id.
it is not surprising that Chief Justice Roberts, another Holmesian Justice, picked up on the “certainly impending” language and used it in his dissent in *Massachusetts v. EPA*,\(^{32}\) excerpted above at § 3.2.

With regard to the second central issue of standing, whether substantial congressional extensions of standing should be permitted, the Holmesian posture of deference to the other branches of government means that Holmesian judges will be relatively willing to allow suits by individual litigants representing the public interest, despite their lack of economic or personal interests, if Congress has clearly authorized such actions. Thus, although they are rather strict when interpreting the Article III injury-in-fact requirement in response to the first central issue of standing, with regard to the second central issue, Holmesian judges can be expected to give Congress substantial leeway in authorizing private actions. Justice Harlan noted in dissent in *Flast v. Cohen*,\(^{33}\) “This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits.”

4. The Instrumentalist Era: 1954-1986

Because of instrumentalist concern with individuals being able to vindicate their rights in court, an instrumentalist approach is more willing than any other decisionmaking style to find that a party has standing, that the case is ripe, is not moot, and that the case does not present a political question.\(^{34}\) For example, Justice Brennan, a classic instrumentalist, wrote, “[C]onstitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of the court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions.”\(^{35}\)

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\(^{32}\) 549 U.S. 447, 541-42 (2007) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting). See also Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013) (“certainly impending” language used, though sensibly criticized by the dissent), discussed at 3.3.5(A) n.60.

\(^{33}\) 392 U.S. 83, 131 (1968) (Harlan, J., dissenting). Justice Harlan added in a footnote, however, "I do not, of course, suggest that Congress' power to authorize suits by specified classes of litigants is without constitutional limitation." Id. at 131 n.21. As for what these limitations might be, Justice Harlan said: "This Court has recognized a panoply of restrictions upon the actions that may properly be brought in federal courts, or reviewed by this Court after decision in state courts. It is enough now to emphasize that I would not abrogate these restrictions . . . ." Id.

\(^{34}\) See Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint*, 47 Md. L. Rev. 118, 127-28 (1987) ("Measured in institutional terms, the constitutional decisions of the Warren and early Burger Courts . . . encouraged constitutional litigation by easing access to the federal courts in constitutional cases, and also by loosening the rules determining whether, when, and upon whose complaint a court will decide a constitutional question.").

Thus, during the 1960s, when instrumentalism held sway on the Court, the Court readily found standing for voters and taxpayers to challenge governmental action. A majority reasoned that standing barriers were based primarily on what was needed for effective judicial administration, rather than on separation of powers concerns about judicial invasion of the province of other branches, which underlies the concrete injury requirement. The critical turning point can be found in the 1962 case of *Baker v. Carr*, where Justice Brennan wrote: “Have the appellants alleged such a personal stake in the outcome of the controversy 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? This is the gist of the question of standing.”

Six years later, Chief Justice Warren cited this language with approval in *Flast v. Cohen*, where the Court found standing for federal taxpayers to raise an Establishment Clause challenge to government spending that reached some parochial schools. The Chief Justice noted in *Flast* that because the question whether "a particular person is a proper party to maintain the action does not, of its own force, raise separation of powers problems," most standing limitations are prudential, imposed as a matter of policy rather than constitutional requirement. The central constitutional core, said Warren, and the rule that "implements the separation of powers prescribed by the Constitution," is merely that the Court will not give advisory opinions. The Chief Justice concluded, “[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” Arguably this suit was on behalf of the public rather than the plaintiffs because the plaintiffs had not suffered any tangible personal injuries. Not surprisingly, there was a Holmesian dissent in the case. Justice Harlan's dissent said that there must be some effectual power in the government to restrain constitutional infractions, but, "as Mr. Justice Holmes wisely observed, the other branches of Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'"

By using language from *Baker v. Carr, Flast v. Cohen* appeared to make possible a wide expansion of the concept of standing in every case, not just cases of taxpayer challenges to government spending. All that was needed was some kind of personal stake in the outcome, relating to the status asserted by the plaintiff, which assured concrete adverseness in the litigation. And, unless the case involved an advisory opinion, Justice Warren's opinion in *Flast* seemed to assume that Congress was not constitutionally limited in its ability to create standing.

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36 369 U.S. 186, 204 (1962).
38 *Id.* at 99.
39 *Id.* at 131 (Harlan, J., dissenting), citing Missouri, Kansas, and Texas R. Co. v. May, 194 U.S. 267, 270 (1904) (Holmes, J., opinion).
40 392 U.S. at 94-101.
This possible result of *Flast* began to become clearer in several cases decided shortly thereafter where the Court extended the loose, prudential approach of *Flast* to actions based upon a congressional statute. For example, the Court was quite willing to follow an attenuated line of reasoning to find an injury in fact caused by the challenged conduct in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*. This case involved § 702 of the Administrative Procedure Act. It authorized judicial review by persons "adversely affected or aggrieved" or "suffering legal wrong." Five law students were permitted to challenge a surcharge imposed on freight rates established by the Interstate Commerce Commission without the ICC first filing a detailed environmental impact statement. The students claimed that the ICC had thereby caused them economic harm and affected their use of the environment because the higher rates proposed by the IOC on freight rates for recyclable goods would lead to greater use of non-recyclable goods, which would harm the environment they enjoyed both in terms of greater amounts of non-recyclable trash and in terms of greater depletion of the forests they enjoyed to produce non-recyclable goods. The Court said that standing is not to be denied simply because many people suffer the same injury, and the Court could not say that plaintiffs could not prove their allegations which, if proved, "would place them squarely among those persons injured in fact by the Commission's action," and entitled to seek review. The same year as SCRAP, the Court explicitly noted the recent expansion of standing doctrine in *Linda R.S. v. Richard D.*, stating, "Recent decisions by this Court have greatly expanded the type of 'personal stake[s]' which are capable of conferring standing on a potential plaintiff."

Regarding the second central issue of standing, the Court assumed congressional power to create standing in *Trafficante v. Metropolitan Life Ins. Co.* There the Court concluded that in § 804 of the Civil Rights Act of 1968 Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others. The Court similarly noted in *Linda R.S. v. Richard D.*, that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."

However, shortly after the high-water mark of a prudential and more relaxed approach to standing was reached in cases like *Flast*, SCRAP, *Trafficante*, and *Linda R.S.*, another process was getting under way that resulted in the Court's return to a largely pre-instrumentalist perspective. Between 1969 and 1972, four new Justices were appointed to the Court. The retirement of Justices Warren

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44 410 U.S. 614, 617 n.3 (1973).
and Fortas resulted in a loss of the 5-Justice instrumentalist majority on the Court (Chief Justice Warren and Justices Douglas, Brennan, Marshall, and Fortas). Although Justice Blackmun, who replaced Fortas, eventually adopted a moderate instrumentalist perspective, after 1973 there were at most only four instrumentalist Justices on the Court at any one time (Justices Brennan, Marshall, Blackmun, and Douglas, replaced by Stevens in 1975). To get the critical fifth vote to follow up vigorously on the path opened by *Flast*, one natural law, formalist, or Holmesian Justice would have to join what the instrumentalist perspective suggested. Based on the historically more limited approach to standing represented by these approaches, this rarely happened.

5. The Modern Natural Law Approach: 1986-Today

A. Modern Doctrine on Injury-in-Fact

Justices using the modern natural law approach have tried to develop a reasoned elaboration of standing doctrine while responding to the tension between the old English common-law basis for standing and the American separation of powers base. In addition, modern standing doctrine has been developed against a backdrop of later judicial precedents regarding standing, many of which suggest for standing a separation of powers base, along with an "injury-in-fact" requirement.

Naturally, standing will be found where a direct, present injury is apparent. Thus, standing was found in *McCleskey v. Kemp*,\(^{45}\) which involved a black criminal defendant, sentenced to death, who had standing to claim race discrimination in sentencing based on certain sentencing statistics because actual harm to him, his death sentence, was his alleged injury. Standing was also found in *Quinn v. Millsap*,\(^{46}\) which involved a plaintiff who did not own real property, who challenged a state law requirement that one had to own real property in order to serve on a government board.

Even where the alleged injury is not so direct or apparent, the Court has been willing to find standing. For example, in *Meese v. Keene*,\(^{47}\) standing was granted where a state representative alleged that his professional reputation would suffer if he were required to exhibit a film using the authorities' label of "political propaganda," since his personal, political, and professional reputation would suffer if the film had to be distributed under that label. This allegation was supported by a public opinion poll and the views of an experienced political analyst. The Court also found standing in *Northeastern Florida Contractors v. Jacksonville*,\(^{48}\) where contractors were allowed to challenge a city's allegedly discriminatory bidding policy without alleging that they would have received contracts had the discrimination not existed. To show injury from a 10% city contract racial set-

\(^{45}\) 481 U.S. 279, 291 n.8 (1987).

\(^{46}\) 491 U.S. 95, 103 (1989).


aside program, non-minority contractors need allege only that they were denied an equal opportunity to compete, not that "but for" the law the plaintiffs would have landed city contracts.

Perhaps most revealingly, as excerpted at § 3.2, in *Lujan v. Defenders of Wildlife*, natural law Justices joined with instrumentalists to indicate that had the plaintiffs bought plane tickets to view the site where the alleged harm to species was occurring, standing would have been granted. Although from a functional, instrumentalist perspective, as in the Justice Stevens and Blackmun dissents in *Lujan*, it may seem nit-picking to have standing turn on whether plaintiffs buy a couple of tickets to visit a site, from the more analytic perspective of a natural law approach, Justices Kennedy and Souter are right that the concreteness of the injury is enhanced if tickets are bought.

Only in cases where the injury was very remote, less personal, or further removed from the challenged conduct, has the Court, with its current majority, refused to find that an injury in fact had occurred. For example, in *Whitmore v. Arkansas*, the petitioner, a death row inmate, challenged the validity of a death sentence imposed on another inmate, a mass murderer who had elected to forgo his right of appeal. The petitioner claiming that he was injured because of the possibility that if he was retried and resentenced he might be disadvantaged by having the other inmate's heinous crime included in a data base. The Court said that petitioner had provided no factual basis to conclude that the sentence imposed on the mass murderer would even be relevant to a future comparative review of his sentence, and thus the complaint represented only a generalized concern about procedures surrounding imposition of the death penalty.

Similarly, in *Lujan v. National Wildlife Foundation*, members of an environmental group lacked standing to question a decision of the Bureau of Land Management concerning mining on public lands. The plaintiffs focused only on the use of some lands "in the vicinity" of the federal tracts on which mining might occur, rather than use of lands that would be more clearly affected by the proposed mining. The plaintiff's complaint thus represented nothing more than a generalized grievance about the Bureau's decisionmaking.

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49 504 U.S. at 579-80 (Kennedy, J., joined by Souter, J., concurring) (plaintiffs would have had a sufficient concrete injury caused by the challenged conduct had they purchased tickets to visit the site); *id.* at 581-83 (Stevens, J., concurring) (buying tickets not required for standing); *id.* at 590-92 (Blackmun, J., joined by O'Connor, J., dissenting) (buying tickets not required for standing).

50 495 U.S. 149, 154-61 (1990). An instrumentalist dissent concluded that because the other inmate had standing, the Court could allow plaintiff to sue as next friend because of the important public interests involved and concrete adverseness could be established, even though it had not been shown that the other inmate was unable to litigate his own cause due to mental incapacity, lack of access to court, or other disability. *Id.* at 176-81 (Marshall, J., joined by Brennan, J., dissenting).

In United States v. Hays, resident voters in one district were held to lack standing to challenge the lines drawn for another district as unconstitutionally based on race, since plaintiffs offered no evidence that they personally suffered injury. Justice O'Connor stated for the majority that unless there is evidence that the plaintiff has personally been subjected to a racial classification, plaintiff "would be asserting only a generalized grievance against governmental conduct." On the other hand, Justice O'Connor noted, "Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."  

The fact that plaintiff may have standing to claim damages for past violations does not in itself establish a real and immediate threat of future injury. In City of Los Angeles v. Lyons, a 5-4 Court held that plaintiff lacked standing to seek an injunction against future chokeholds by the Los Angeles police force. Plaintiff had pled past injury, but the majority said it was only speculation that plaintiff might again be stopped and choked. In dissent, instrumentalist Justices Brennan, Marshall, Blackmun, and Stevens objected that since no one can show that he or she will be choked in the future, the Court's theory meant that no one would have standing to question a possibly invalid police policy. Justice Marshall said that the plaintiff had standing from the past injury, and since plaintiff was choked pursuant to city policy, there was a basis for the District Court's equitable relief – a preliminary injunction not to use the hold except when threatened by deadly force.

In Massachusetts v. EPA, excerpted at § 3.2, a 5-4 Court held that Massachusetts had standing to challenge the failure of the EPA to make a judgment on whether it should regulate greenhouse gas emissions from new motor vehicles. In contrast, in Summers v. Earth Island Institute, a 5-4 Court held that certain environmental organizations lacked standing to challenge the United States Forest Service concerning its allegedly illegal decision to conduct a salvage sale of timber without providing notice, comment, and appeal. Justice Scalia wrote that the plaintiff organizations had not identified any application of the challenged regulation that threatened imminent and concrete harm. Consistent with his concurrence in Lujan, Justice Kennedy said Summers would be different, and more like Massachusetts v. EPA, if Congress had sought to provide redress for a concrete injury. Here, however, Congress had provided for a procedural right to bring an action against the Forest Service, but had not identified an interest separate from that right, and a procedural right not related


55 Id. at 120-30 (Marshall, J., joined by Brennan, Blackmun & Stevens, JJ., dissenting).

to a separate concrete interest does not confer standing.\textsuperscript{57} In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, said that the test should be whether there is a realistic likelihood that the challenged conduct will, in fact, recur and harm the plaintiff.\textsuperscript{58}

In \textit{Hollingsworth v. Perry},\textsuperscript{59} a 5-4 Court held that proponents of California Proposition 8, a voter-enacted ballot initiative that amended the California Constitution to provide that only marriage between a man and a woman was valid, did not have standing to appeal a district court’s order declaring the Proposition unconstitutional. While the individual plaintiffs, same-sex couples, did have standing in the trial court to challenge Proposition 8, as their ability to get married was injured, once the plaintiffs prevailed in the trial court, and the state of California refused to appeal that decision, general supporters of Proposition 8 were held only to have a “generalized grievance” shared by other citizen supporters of Proposition 8. The Court did note that if the proponents of Proposition 8 had been appointed as “agents” of the state they might have standing to represent the state’s interest in the case. But, here, none of the traditional indicia of agency existed. The practical result of this decision was that the district court’s striking down of Proposition 8 was upheld, and same-sex marriage became lawful in California, as discussed at § 23.4.3 n.53.

A four-Justice dissent acknowledged that because standing in federal court is a matter of federal law, it was not binding on federal courts that the California Supreme Court had concluded that under California law these proponents would have standing to have their appeal heard in state courts. Nevertheless, the dissent concluded that because under state law these proponents would have had a “state-defined status” and “authority to appear in court and assert the State’s interest in defending an enacted initiative when the public officials charged with that duty refuse to do so,” that should be sufficient to give them a concrete injury under federal law, despite not being official “agents” of the state, and that under the majority’s decision, a majority of state citizens voting for a referendum cannot ensure that referendum will be enforced, as long as a district court finds it unconstitutional, and then the requisite state official, Governor or Attorney General, refuses to appeal the decision.\textsuperscript{60}

\textsuperscript{57} \textit{Id.} at 1153 (Kennedy, J., concurring).

\textsuperscript{58} \textit{Id.} at 1155-56 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

\textsuperscript{59} 133 S. Ct. 2652, 2662-67 (2013).

\textsuperscript{60} 133 S. Ct. at 2668 (Kennedy, J., joined by Thomas, Alito & Sotomayor, JJ., dissenting). \textit{See also} Clapper v. Amnesty International USA, 133 S. Ct. 1138, 1143, 1147-50 & n.5 (2013) (using “certainly impending” language, plaintiff failed to show sufficiently “concrete” injury “fairly traceable” to challenged conduct, based on the alleged likelihood that their communications with foreign individuals, whom they believe to be likely targets of FISA wiretapping, will be wiretapped); \textit{id.} at 1155, 1160-65 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (likelihood of government surveillance “sufficiently certain” to occur and not “speculative,” discussing, \textit{inter alia}, many Court decisions not requiring the injury to be “certainly impending”); Drake v. Obama, 664 F.3d 774 (9\textsuperscript{th} Cir. 2012) (a range of “birthers” – voters, taxpayers, state representatives, and active military personnel – all lack “concrete” injury to sue President Obama).
B. **Modern Causation Analysis**

Under the modern natural law approach, causation is easy to establish if the plaintiff's injuries are caused directly by the allegedly unconstitutional feature of a law. If the injury is indirect, however, it may be more difficult to show causation. For example, in *Warth v. Seldin*, plaintiffs charged a zoning board with discriminating against persons of low and moderate income by vigorous enforcement of a zoning ordinance against developers and builders who might otherwise build some low-income and moderate-income housing. In addition to their lack of injury in fact, the plaintiff home-buyers were also held to lack standing because the record suggested that their inability to live in Penfield was caused by "the economics of the area housing market, rather than of respondents' allegedly illegal acts." Plaintiff builders lacked standing because they did not allege that they had specific projects for which they would like to seek approval.

However, as with *Lujan*, where merely buying tickets would have been sufficient to satisfy the injury-in-fact and causation requirements, causation can be established in a *Warth*-like case as long as some attention is paid to make sure causation actually exists. For example, causation was proved in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* by a plaintiff who alleged he would have qualified for low-cost housing in a specific project blocked by allegedly unconstitutional zoning laws. Because there was a specific project and indications the plaintiff would qualify absent the zoning law, causation was established, and *Warth* was distinguished.

Indirect causation was also established in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* In *Duke Power*, the Court decided that the Price-Andersen Act limiting liability to $500 million for injuries caused by an accident at a nuclear power plant was causally related to the ability to obtain financing to build nuclear power plants which, in turn, caused injury to plaintiffs. Indirect causation was also found in *Meese v. Keene*, the case involving a state representative wishing to exhibit a film without labeling it "political propaganda." The causal connection between exhibiting the films identified as political propaganda, and the state senator's reputation, was supported in the case by a public opinion poll and the views of an experienced political analyst.

C. **Modern Doctrine on Redressability**

The third element of standing – the requirement of redressability – concerns whether the court action sought would be likely to correct or prevent the problem from occurring. If causation is

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established, redressability is usually a foregone conclusion, since, in addition to any damage award that might be appropriate, the Court can grant an injunction preventing the challenged conduct which is causing the harm.66 On the other hand, in some cases redressability is viewed by the Court as adding something to the causation analysis.

Redressability was an issue in Steel Co. v. Citizens for a Better Environment.67 This was a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act (EPCRA). An environmental association sued a small manufacturing company for past violations of EPCRA in failing to file an annual hazardous-chemical inventory and toxic-chemical release forms. The Act provided for "any person" to commence a civil action against an owner who failed to file such forms. After the action was filed the defendant submitted all of the overdue forms. The Court dismissed the case for lack of standing since redressability had not been shown. In discussing the issue of redressability, Justice Scalia explained that none of the items of relief sought would serve to reimburse plaintiffs for their loss of useful information.

Another case of redressability occurred in Wyoming Sawmills, Inc. v. United States Forest Service.68 In this case, the Tenth Circuit held that a timber company’s complaint – that the Forest Service’s plans to consult with Native American tribes to minimize any Forest Service action on sites sacred to the tribes violated the Establishment Clause – failed for lack of redressability. The court noted that while the timber company might have an injury-in-fact from lost timber sales depending on the Forest Service action, any future timber sales lie within the discretion of the Forest Service, and thus the court could do nothing to redress their concern.

§ 3.4 Prudential Standing Doctrine

1. Generalized Grievances and the “Zone of Interests” Test for Standing

A. Generalized Grievances

Even if a plaintiff alleges a constitutionally adequate injury under Article III that was caused by the challenged conduct and that can be redressed by the Court, the Court will not adjudicate generalized grievances pervasively shared and more appropriately addressed by the representative branches.


Lujan v. Defenders of Wildlife  
504 U.S. 555 (1992)

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part III-B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

IV

We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy. For example, in *Fairchild v. Hughes*, 258 U.S. 126, 129-130 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court: “[This is] not a case within the meaning of . . . Article III. . . . Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit. . . .” Ibid.

In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . Here the parties plaintiff have no such case. . . . [T]heir complaint . . . is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess. Id., at 488-489.

In *Ex parte Lévitt*, 302 U.S. 633 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2. “It is an established principle,” we said, “that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.” 302 U.S., at 634. See also *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433–434 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson*, 418 U.S. 166 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the
expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” We held that such a suit rested upon an impermissible “generalized grievance,” and was inconsistent with “the framework of Article III” because “the impact on [plaintiff] is plainly undifferentiated and ‘common to all members of the public.’” Richardson, supra, at 171, 176-177. And in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, “standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance. . . . Since Schlesinger we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because “‘assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.’” Allen, 468 U.S., at 754; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of “‘the public interest protections of the Eighth Amendment’”; once again, “[t]his allegation raise[d] only the ‘generalized interest of all citizens in constitutional governance’ . . . and [was] an inadequate basis on which to grant . . . standing.” Whitmore, 495 U.S., at 160.

During the instrumentalist era, when the Article III standing doctrine was easier for plaintiffs to meet, the prudential principle regarding generalized grievances was used to deny plaintiffs standing in cases where plaintiffs had Article III standing. Thus, as indicated in the passage from Lujan above, the Court held that a taxpayer lacks standing in a suit against the CIA to learn details of its expenditures on the theory that published statements of account are required by Art I, § 9, cl. 7, and that, lacking such publications, plaintiff cannot be an informed voter. So, too, reservists and citizens had only an abstract interest in, and no nexus as taxpayers for, objecting to CIA secrecy.69

Near the end of the instrumentalist era, in 1984, a 5-Justice non-instrumentalist majority, in an opinion written by Justice O’Connor, held in Allen v. Wright,70 excerpted at § 3.2, that citizens with only generalized grievances against unlawful governmental actions, or members of minority groups with only generalized grievances against having their minority group stigmatized, did not have a sufficiently “distinct and palpable” injury to satisfy the injury-in-fact test of Article III standing.

69 Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974); United States v. Richardson 418 U.S.166 (1974). See also Drake v. Obama, 664 F.3d 774 (9th Cir. 2012) (a range of “birthers” – voters, taxpayers, state representatives, and active military personnel – all lack sufficiently “concrete” injury to sue President Obama)

Thus, the Court transferred the concern with generalized grievances from prudential principles doctrine to Article III “injury-in-fact” standing doctrine. For this reason, the prudential principle regarding generalized grievances has limited applicability today. The most importance consequence of this shift is that once the generalized grievance concern is an Article III concern, not a prudential principle, Congress cannot easily reinstate jurisdiction for plaintiffs with generalized grievances through a statutory citizen-suit provision. Instead, Congress has to use whatever power it has under Article III analysis “to define injuries and articulate chains of causation” where none existed before, as stated in Justice Stevens’ opinion in Massachusetts v. EPA, excerpted at § 3.2, citing Justice Kennedy’s concurrence in Lujan, excerpted at § 3.2, a more confined congressional power.

B. The "Zone of Interests" Test

During the instrumentalist era, when Article III standing was easier to achieve, the Court developed the constitutional “zone of interests” test in 1968 in Flast v. Cohen. In Flast, Chief Justice Warren concluded that while there was no absolute Article III bar to taxpayers suing as taxpayers, the plaintiff would have to meet a two-pronged “zone of interests” test. Under this test, there must be a logical link between the party's status and the type of legislative enactment attacked. Second, a taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Thus, a taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed on the exercise of the taxing and spending power. The taxpayers in Flast satisfied both parts of the nexus test because they were challenging the exercise of congressional spending under Article I, § 8, and the Establishment Clause specifically limits the taxing and spending power granted by Article I, § 8.

With the more stringent view of Article III standing which developed after the Warren Court, the Flast “zone of interests” test has been limited its precise facts, as in Bowen v. Kendrick. Despite the case being one involving taxpayer standing, the Court held in Bowen that taxpayers had standing to bring an Establishment Clause challenge to a federal grant program administered by HEW, since funding for service relating to adolescent sexuality and pregnancy could be provided to religious organizations. Although the general reasoning of Flast has been rejected by the post-instrumentalist Court, the Court relied upon the core holding of Flast as a precedent to support its holding in Bowen.

In no other case, including cases with similar facts, has the Court applied the Flast test to grant standing to taxpayers, or any other parties with generalized grievances. Following Allen v. Wright in 1984, the Court holds in these cases that taxpayers do not have a sufficiently distinct injury to satisfy the modern injury-in-fact requirement of Article III standing.


The Court’s opinion in *Valley Forge Christian College v. Americans United for the Separation of Church and State*[^74] is a good example of the current approach to *Flast*. In *Valley Forge*, a nonprofit organization composed of 90,000 taxpayer members, challenged as a violation of the Establishment Clause the sale of surplus federal property to an educational institution operating under supervision of a religious order. A majority of the Court concluded that the group had no standing to bring the complaint. The plaintiffs claimed that *Flast* acknowledged that the Establishment Clause gives each citizen a personal constitutional right to a government that does not establish religion. Justice Rehnquist distinguished *Flast* on narrow factual grounds, saying that *Valley Forge* was an exercise of Congress’ power under the Property Clause rather than the Spending Clause of Article I, § 8.

The recent trend of the Court limiting *Flast* to its precise facts continued in *Hein v. Freedom From Religion Foundation, Inc.*[^75] In *Hein*, the Court held that taxpayers did not have standing to challenge executive branch action allegedly violating the Establishment Clause, since *Flast* involved congressional appropriation, not executive action. Thus, *Flast* was held not to apply. Consistent with an instrumentalist view that the general reasoning of *Flast* supports standing, Justices Stevens, Ginsburg, and Breyer dissented, as did Justice Souter, who, as noted at § 1.1.2 text following n.11 & Table 3, has an occasionally affinity for the reasoning of instrumentalist-era precedents.[^76]


[^75]: 551 U.S. 587, 592-93 (2007) (Alito, J., joined by Roberts, C.J., and Kennedy, J., announced the judgment of the Court). Concurring, Justice Kennedy indicated that where cases fall within the exact boundaries of *Flast* – challenges to legislative appropriations under the Spending Clause – he was willing to follow *Flast*. *Id.* at 615-16 (Kennedy, J., concurring). This is consistent with Justice Kennedy’s natural law approach to precedent, discussed at § 2.4.4 n.86, which tends to follow precedent unless there is a special reason to overrule. Formalist Justices Scalia and Thomas would have overruled *Flast* entirely, as *Flast* is inconsistent with modern standing doctrine requiring “distinct” injuries. *Id.* at 618-20 (Scalia, J., joined by Thomas, J., concurring in the judgment).

[^76]: *Id.* at 637-40 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting). For additional cases limiting *Flast* to its facts, see *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011) (tax credit to religious organizations are not appropriations under the Spending Clause, and thus *Flast* does not apply to grant standing); *id.* at 1450 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting); *Sherman v. Illinois*, 682 F.3d 643, 645-47 (7th Cir. 2012) (taxpayer lacks standing to challenge $20,000 grant to non-profit group for restoration of 111-foot-tall Latin cross because money was part of a “lump-sum appropriation intended to fund the pork-barrel projects of individual legislators,” not the result of a specific legislative appropriation).
2. Third Party Rights

The general rule is that plaintiffs must assert their own rights and do not have standing to raise the rights of third persons. But there are exceptions. If a plaintiff has suffered injury and is closely related to another whose rights might be diluted if plaintiff could not assert them, the plaintiff may contend that a law is unconstitutional because it impinges on the rights of those third parties.

The Court stated in Singleton v. Wulff\textsuperscript{77} that for third-party standing to be granted the plaintiff must show, in addition to that party’s own Article III standing, that: (a) the plaintiff is in a sufficiently special relationship with the third-party that the plaintiff can reasonably be expected properly to frame the issue and litigate vigorously on the third-party’s behalf; and (b) practical obstacles prevent the third-party from asserting the rights on his or her own. In applying this test, the Court takes practical considerations into account. For example, the Court acknowledged in Wulff the privacy concerns of women seeking abortions might limit their ability to bring lawsuit themselves, although the literal option of using a fictitious name, like Roe or Doe, is present.

The third-party standing test has been satisfied by doctors suing on behalf of their patients, or businesses suing on behalf of potential customers.\textsuperscript{78} On the other hand, an attorney whose only relationship to indigent criminal defendants was a prospective attorney-client relationship with as-yet unknown clients lacked third-party standing to challenge a state practice of refusing to appoint appellate counsel for indigent defendants who pleaded guilty or non contenderit, although Justices Stevens, Ginsburg, and Souter dissented from this conclusion.\textsuperscript{79}

Not surprisingly, instrumentalist Justices have been the most willing to find that third-party standing exists, while formalist and Holmesian Justices have been less willing to grant third-party standing. Of course, a statute may also grant the right to represent others, and where such a statute clearly indicates that intent even formalist and Holmesian judges will give the statute that interpretation, since Congress can always overrule a prudential principle by statute. An additional aspect of third-party standing involves the ability of parties in First Amendment free speech cases to challenge a

\begin{itemize}
\item See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (majority allowed a saloon-keeper to assert the rights of potential male patrons under 21 who were being denied the right to purchase alcohol); Singleton v. Wulff, 428 U.S. 106 (1976) (doctor permitted to sue on behalf of patients regarding abortion regulations).
\item Kowalski v. Tesmer, 543 U.S. 125, 128-34 (2004); id. at 138-41 (Ginsburg, joined by Stevens & Souter, JJ., dissenting). See also Gilmore v. Utah, 429 U.S. 1012 (1976) (mother of death-row inmate denied third-party standing to challenge application of the death penalty because there were no practical obstacles to the inmate bringing a challenge, and the inmate refused any further appeals, being resigned to execution); id. at 1017-18 (White, J., joined by Brennan & Marshall, JJ., dissenting).
\end{itemize}
statute as substantially overbroad, and thus unconstitutional as applied to other parties, even though the statute could be validly applied to their conduct, addressed at § 33.4.80

3. Standing for Organizations, States, and Elected Representatives

Three main types of representational standing cases exist: organizational standing, standing of states to sue on behalf of state citizens, and suits by legislators.

An association can sue as representative of its members if: (a) one or more members satisfy the Article III requirements for standing; (b) the interests to be protected are germane to the organization so that the organization can properly partake of its member’s Article III standing; and (c) neither the claim, nor the relief requested, require the participation of the individual members.81 The first two of these requirements are constitutional Article III requirements. The third is prudential, and is relatively easy to meet regarding injunctive relief, but more difficult to prove if the claim is for damages.82 As the Court has noted, there is a “hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity,” as well as a “risk that the damages recovered by the association will fail to find their way into the [members’] pockets.”83

States may assert citizens' rights against other individuals or corporations as parens patriae when sovereign or quasi-sovereign interests are implicated, that is, the interests to be protected in the lawsuit are germane to the state’s functioning.84 However, the Court has consistently held that states cannot used the parens patriae power against other states, nor against the federal government, where the state would be entering a controversy as a nominal party in order to forward the claims of individual citizens.85

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83 Id. at 556.


85 Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); North Dakota v. Minnesota, 263 U.S. 365 (1923); New Hampshire v. Louisiana, 108 U.S. 76 (1883) (state v. state cases);
On the other hand, a state may act as “the representative of its citizens in original actions [in the Supreme Court] where the injury alleged affects the general population of a State in a substantial way.” Of course, suits by states are also permissible to protect the state’s sovereign power of government, or its own proprietary capacity in a state-run business, as long as the state meets the constitutional requirements of Article III. A classic case of this kind is a state versus state lawsuit over a boundary dispute between the states. Cities, or other municipalities, may also have standing to bring complaints against their state, despite being “creatures” of the state, to protect property interests deriving from action in a proprietary capacity, as opposed to substantive matters of the state's political organization, where no standing would exist. Whether foreign states may sue in federal courts as parens patriae to vindicate the rights of their citizens is a questionable.

Historically, legislators have been able to sue to vindicate the interests of their branch of government. Cases during the instrumentalist era permitted legislators to sue on behalf of their branch, House or Senate, even if only a minority of legislators in that branch joined the lawsuit. However, in 1997 in Raines v. Byrd, the Court decided that, at a minimum, to entertain such lawsuits brought on behalf of the House or Senate a majority of the House or Senate members must


See Michael A. Lawrence, Do “Creatures of the State” Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State, 47 Vill. L. Rev. 93 (2002).

See generally Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 337-43 (1st Cir. 2000) (absent a clear indication to the contrary from the Supreme Court, or the legislative or executive branches, parens patriae standing can only be granted to domestic states, not foreign countries); Kenneth Juan Figueroa, Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments, and Protection From Private Discrimination, 102 Colum. L. Rev. 408 (2002).


See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (case dismissed on political question and ripeness, not standing, although a minority of members of both Houses had brought the lawsuit).

join in the lawsuit for standing prudentially to be granted. The majority’s opinion in Raines provoked dissents by Justices Stevens and Breyer, and a concurrence on narrower prudential grounds particular to the individual case by Justice Souter, joined by Justice Ginsburg.93

The Court’s decision in Raines was followed by a lower court in Walker v. Cheney.94 In Walker, the Comptroller General of Congress was denied power to sue Vice-President Cheney to release documents related to an Energy Task force on grounds that a majority of neither the House of Representatives nor the Senate had joined the lawsuit. Since 1993, the House of Representatives has had a 5-person Bipartisan Legal Advisory Group (BLAG) made up of the Speaker of the House, and the majority and minority leader and whip in the House, who are charged with the authority to sue in the name of the House. Whether BLAG satisfies the doctrine of Raines has yet to be directly litigated. Since BLAG is not based on congressional legislation, but internal House decisionmaking, the rule that Congress can override court-created prudential principles by statute would not apply.

4. Equitable Discretion

In Allen v. Wright95 the Court stated that standing considerations may “shade into . . . whether the complaint states a sound basis for equitable relief.” This is particularly true, the Court stated in Rizzo v. Goode, if the plaintiff seeks “to enjoin the activity of a government agency” because the Government has traditionally been granted wide latitude in “dispatch of its own internal affairs.”96

Without regard to “equitable relief,” sometimes the Court concludes based on general prudential considerations not to hear the case. For example, in Elk Grove Unified School District v. Newdow,97 a case challenging the constitutionality of reciting in public school the phrase “under God” in the Pledge of Allegiance, the Court decided that Mr. Newdow lacked standing to challenge the Pledge, despite Mr. Newdow having Article III standing based on an injury to his right as a father to make decisions regarding raising his child. This case did not involve third-party standing, as Mr. Newdow did not have the legal right to sue on behalf of his daughter, and the ex-wife, who did have the legal right to represent the daughter, opposed the lawsuit. The Court stated, “This case concerns not merely Newdow’s interest in inculcating his child with his views on religion, but also the rights of the child’s mother as a parent generally and under the Superior Court orders specifically. And most

93 Id. at 830 (Souter, J., joined by Ginsburg, J., concurring); id. at 835 (Stevens, J., dissenting); id. at 838 (Breyer, J., dissenting).


96 423 U.S. 362, 378-79 (1976), and cases cited therein.

97 542 U.S. 1, 9-12, 15 (2004).
important, it implicates the interests of a young child who finds herself at the center of a highly public debate.” Thus, Newdow “lacks prudential standing to bring this suit in federal court.”

On the other hand, sometimes equitable considerations counsel the Court to take the case. In United States v. Windsor, the Court found that the United States had standing to appeal a lower district court’s ruling that the Defense of Marriage Act of 1996 (DOMA) was unconstitutional because, although no longer opposing a finding that DOMA is unconstitutional, the United States still refused to pay plaintiffs the money to which they were entitled if their marriage were treated as valid under federal law. The district court’s order for the United States Treasury to pay the money was an injury to the United States giving them Article III standing. Regarding prudential concerns that there exist sufficient adversariness to ensure the issues before the Court are fully presented, the majority noted that attorneys for the BLAG presented “a substantial argument for the constitutionality” of DOMA. The Court also noted, “Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations.” The merits of the case are addressed at United States v. Windsor, excerpted at § 23.4.3.

Three Justices dissented on standing. They concluded that because plaintiffs had won in the lower federal courts, and the Obama Administration indicated it would no longer oppose such rulings, there was no Article III standing. The dissent said, “The final sentence of the Solicitor General's brief on the merits reads: ‘For the foregoing reasons, the judgment of the court of appeals should be affirmed.’ Brief for United States (merits) 54 (emphasis added). That will not cure the Government's injury, but carve it into stone. . . . Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.”

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100 Id. at 2696-97 (Scalia, J., joined by Thomas, J., and Roberts, C.J., as to Part I, dissenting).
CHAPTER 4: JUSTICIABILITY DOCTRINES OTHER THAN STANDING

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§ 4.1 Ripeness Doctrine

The Court has said that a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.\(^1\) A case is ripe for decision in a federal court only if plaintiff has suffered a specific present harm or plaintiff seeks to enjoin a specific proceeding that is threatened or underway so the case has an “imminence and reality.”\(^2\)

In making this determination, the Court considers both: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.\(^3\) The ripeness problem often arises in actions for a declaratory judgment or an injunction. Because the conduct alleged to create a constitutional issue may never take place, the Court proceeds on a case-to-case basis.\(^4\) If plaintiff shows only a generalized fear of prosecution under a statute not being enforced, the case will likely be viewed as not ripe for a declaratory judgment on constitutionality.\(^5\) Where the threat of injury is immediate enough, however, the Court may conclude that the case is ripe for resolution, given the hardship to the plaintiff if the plaintiff were required to wait and be prosecuted under the statute before the case could be heard. The relevant provisions regarding declaratory judgments are 28 U.S.C. § 2201 and Fed. R. Civ. P. Rule 57.


\(^5\) For example, the Court dismissed a challenge to Connecticut's ban on using birth control devices since it had not been enforced and there was no real fear of personal liability. Poe v. Ullman, 367 U.S. 497 (1961). However, in Epperson v. Arkansas, 393 U.S. 97 (1968), the Court reversed a state court decision upholding the validity of a law that prohibited the teaching of evolution in public schools even though, as Justice Black noted, *id.* at 109-11 (Black, J., concurring), there was no evidence that the statute ever been enforced during its 40 years on books.
If the lawsuit involves a “facial” attack on the law, rather than “as applied,” and thus the precise facts are not as critical for resolution, there are indications that the Court may be more willing to find a sufficient threat, since waiting will not help further “crystallize” the issue for judicial review.6 The Court seems particularly concerned with potential hardship when the prosecution would involve a criminal prosecution, particularly with the potential of jail time, as opposed to a civil prosecution. Where the potential is only for administrative fines, or a case involving only monetary damages, as in Takings Clause cases, the Court’s concern with the potential hardship to the individual of having to wait to see if the fine is imposed is much less.7 Of course, in addition to establishing standing and that the case is ripe, the plaintiff in an action for an injunction must also show the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.8

In general, liberal instrumentalists have been more willing to find cases ripe for resolution, because of their preference to proceed to the merits and do justice in the case. Holmesian judges, because of their greater posture of deference to government, have been less willing to find cases ripe for resolution, as are formalist judges, because of their literalness in ensuring that an injury has in fact occurred. Based on their respect for precedent, combined with the background natural law principle of “where there is a right, there should be remedy,” natural law judges tend to be in the middle, without a strong predisposition in either direction.

Given these considerations, cases from the Holmesian and instrumentalist eras, in particular, have a tendency to reach different results on ripeness even when the underlying facts are similar. A case that sheds light on the meaning of "imminence" during the Holmesian era is United Public Workers v. Mitchell.9 There, the plaintiffs sought a declaratory judgment that the Hatch Act, which limits the

6  See, e.g., United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947) (“As applied” challenge by government workers who sought an injunction against the Hatch Act because it might unconstitutionally make illegal certain political activities in which they planned to engage did not have a ripe case); Adler v. Board of Education, 342 U.S. 485, 486-87 (1952) (“Facial” attack on a state law that required the discharge of teachers who belonged to allegedly subversive groups was treated as ripe, over a dissent saying plaintiffs were merely complaining of a chill on teachers joining groups); id. at 503-05 (Frankfurter, J., dissenting).


8  See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (Court should exercise restraint in enjoining state police officers in the absence of irreparable injury great and immediate).

9  330 U.S. 75 (1947). See also International Longshoreman’s & Warehousemen’s Union, Local 37 v. Boyd, 347 U.S. 222 (1954) (resident aliens planning to work in Alaska during the summer, prior to Alaska becoming a state, did not have a ripe case to sue to enjoin immigration officials from preventing their return to the United States; they had to go to Alaska, and if refused return, sue then); id. at 224-25 (Black, J., joined by Douglas, J., dissenting).
political activities of government employees, violated their First Amendment rights, and they provided detailed affidavits listing the activities in which they wished to engage. Nevertheless, the Court held that such a challenge was not ripe on behalf of employees who simply desired to engage in the prohibited activities. The Court said that the separation of powers doctrine calls for courts to avoid writing advisory opinions and the Court should not adjudicate unless there are prejudicial interferences with definite rights. During the instrumentalist era, however, in United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,10 the Court found a challenge to the Hatch Act to be ripe, concluding that the plaintiffs had shown that they desired to engage in specific political activities, and the threat of prosecution was “imminent” enough.

A good discussion of ripeness from the modern post-1986 Court perspective occurred in Ohio Forestry Ass'n, Inc. v. Sierra Club.11 There a unanimous Court held not ripe for judicial review the Sierra Club’s request for an injunction barring the United States Forest Service from permitting timber harvest under its then-current plan. The Court stressed that before the plan could be implemented the Service would have to choose logging areas and methods, hold a hearing, conduct an environmental analysis, and make a final decision to permit logging, which could be challenged in an administrative appeals process and in court. Justice Breyer explained that: (1) to withhold court consideration would not cause the parties significant hardship since the club had an ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain; (2) immediate judicial review could hinder agency efforts to refine its policies; (3) immediate judicial review would have to take place without benefit of the focus that a particular logging proposal could provide; and (4) Congress had not provided for pre-implementation judicial review of forest plans, as it had done in some other federal agency laws.

The Court did find ripeness in Suitum v. Tahoe Regional Planning Agency.12 There the plaintiff alleged that a state planning agency committed an unconstitutional regulatory taking when it determined that her residential lot was ineligible for development. The Court held that the agency had made a final decision that plaintiff’s land was within a no-development zone, and there was no question that nothing could be built there.

Regarding whether the doctrine is merely prudential or has some constitutional basis, it seems clear that the ripeness doctrine is grounded in both Article III and prudential concerns. As the Court stated in Reno v. Catholic Social Services, Inc.,13 “We have noted that the ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” In some cases, the Court will conclude, as it did in City of Los Angeles v.

Lyons, that Article III standing and ripeness requirements are not met. Other times, as in Justice Powell's opinion in *Goldwater v. Carter*, it is clear that the Court has found Article III satisfied, but that it would not be prudent to decide the case. The Court has indicated that both Article III and prudential ripeness concerns may be considered on the Court’s own motion.

Most often, the Court does not carefully explain whether the resolution of the ripeness issue involves Article III or only prudential concerns. However, formalists and Holmesians, reflecting the “positivist” aspect of their judicial decisionmaking style, tend to put ripeness on Article III grounds, as though the matter is out of their hands. To preserve their ability to reach out and decide important issues, instrumentalist judges tend to discuss ripeness in prudential terms and, thus, attempt to preserve flexibility in application of the doctrine. In terms of a natural law focus on reasoned elaboration of the law, it would be helpful if the Court would state what difference there is, if any, between the Article III requirement of a “case or controversy” sufficient to grant standing, with its injury-in-fact requirement, and an Article III requirement of a sufficiently ripe case. While there was perhaps a need for an Article III ripeness requirement during the instrumentalist era, where Article III standing was much easier to achieve, as discussed at § 3.3.4, in the modern era if a litigant has Article III standing that case would appear to be sufficiently ripe under any Article III ripeness analysis. Perhaps for this reason, most modern ripeness cases tend to focus on prudential consideration of whether, even though the party has Article III standing, the case should not be heard on prudential ripeness grounds. Under this approach, the “case” or “controversy” injury-in-fact requirement of standing doctrine would encompass both Article III standing and Article III ripeness concerns. This would be consistent with the Court’s recent precedents, which in speaking about the Article III ripeness test have typically resorted to general “case” or “controversy” language.

Of course, where the Justices wish to reach the merits of a case, ripeness may well be found in close cases even by formalist and Holmesian Justices. For example, in *Bush v. Gore*, Justice Scalia indirectly addressed a ripeness concern when, in his concurrence to the Emergency Stay Order, he stated that “irreparable injury” would result to “petitioner [Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.” In this view, Bush’s challenge to

14 461 U.S. 95, 105-10 (1983).
15 444 U.S. 996, 996 (1979) (Powell, J., concurring in the judgment) (as a prudential matter, a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority).
the Florida Supreme Court’s recount proceedings was ripe for resolution, even though it was speculative whether the recount would show that Bush won or lost, and thus it was unclear whether the recount would cast a cloud of legitimacy over his election as president, or help to confirm it.

In contrast, as four Justices noted in dissent in *Bush v. Gore*, “If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedures provided in 3 U.S.C. § 15.”

Based on the results of a later recount of the ballots at issue in *Bush v. Gore* by a consortium of newspaper and news media outlets, which showed that Bush would still have had more votes than Gore after the Florida Supreme Court’s ordered recount, noted at § 24.4 n.32, the dissent may well have been right in their assertion that *Bush v. Gore* was not ripe for resolution under normal ripeness principles.

Abbott Laboratories v. Gardner

387 U.S. 136 (1967)

Justice HARLAN delivered the opinion of the Court.

In 1962 Congress amended the Federal Food, Drug, and Cosmetic Act, (52 Stat. 1040, as amended by the Drug Amendments of 1962, 76 Stat. 780, 21 U.S.C. § 301 et seq.), to require manufacturers of prescription drugs to print the “established name” of the drug “prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug,” on labels and other printed material, s 502(e)(1)(B), 21 U.S.C. s 352(e)(1)(B). The “established name” is one designated by the Secretary of Health, Education, and Welfare pursuant to § 502(e)(2) of the Act, 21 U.S.C. s 352(e)(2); the “proprietary name” is usually a trade name under which a particular drug is marketed. The underlying purpose of the 1962 amendment was to bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their “established” or less familiar trade names at significantly lower prices.

The present action was brought by a group of 37 individual drug manufacturers and by the Pharmaceutical Manufacturers Association, of which all the petitioner companies are members, and which includes manufacturers of more than 90% of the Nation's supply of prescription drugs. They challenged the regulations on the ground that the Commissioner exceeded his authority under the statute by promulgating an order requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material.

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19. *Id.* at 129 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy “ripe” for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

As to the former factor, we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed. Both sides moved for summary judgment in the District Court, and no claim is made here that further administrative proceedings are contemplated. It is suggested that the justification for this rule might vary with different circumstances, and that the expertise of the Commissioner is relevant to passing upon the validity of the regulation. This of course is true, but the suggestion overlooks the fact that both sides have approached this case as one purely of congressional intent, and that the Government made no effort to justify the regulation in factual terms.

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, “Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.” 228 F.Supp. 855, 861. The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance – continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner – may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of “misbranded” drugs.

It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act
and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

The Government does not dispute the very real dilemma in which petitioners are placed by the regulation, but contends that “mere financial expense” is not a justification for pre-enforcement judicial review. It is of course true that cases in this Court dealing with the standing of particular parties to bring an action have held that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action. Frothingham v. Mellon, 262 U.S. 447; Perkins v. Lukens Steel Co., 310 U.S. 113. But there is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions. Compare Columbia Broadcasting System v. United States, 316 U.S. 407; 3 Davis, Administrative Law Treatise, c. 21 (1958). This case is, therefore, remote from the Mellon and Perkins cases.

The Government further contends that the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic; the Solicitor General has represented that if court enforcement becomes necessary, “the Department of Justice will proceed only civilly for an injunction . . . or by condemnation.” We cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it.

Texas v. United States

Justice SCALIA delivered the opinion of the Court.

Appellant, the State of Texas, appeals from the judgment of a three-judge District Court for the District of Columbia. The State had sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, do not apply to implementation of certain sections of the Texas Education Code that permit the State to sanction local school districts for failure to meet state-mandated educational achievement levels. This appeal presents the question whether the controversy is ripe.

A claim is not ripe for adjudication if it rests upon “‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580-581 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). Whether Texas will appoint a master or management team under §§ 39.131(a)(7) and (8) [which would trigger the preclearance provisions] is contingent on a number of factors. First, a school district must fall below the state standards. Then, pursuant to state policy, the Commissioner must try first “the imposition of sanctions which do not include the appointment of a master or management team,” App. 10 (Original Complaint ¶ 12). He may, for example, “order the preparation of a student achievement
improvement plan . . ., the submission of the plan to the [C]ommissioner for approval, and implementation of the plan,” § 39.131(a)(3), or “appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent,” § 39.131(a)(6). It is only if these less intrusive options fail that a Commissioner may appoint a master or management team, Tr. of Oral Arg. 16, and even then, only “to the extent the [C]ommissioner determines necessary,” § 39.131(a). Texas has not pointed to any particular school district in which the application of § 39.131(a)(7) or (8) is currently foreseen or even likely. Indeed, Texas hopes that there will be no need to appoint a master or management team for any district. Tr. of Oral Arg. 16-17. Under these circumstances, where “we have no idea whether or when such [a sanction] will be ordered,” the issue is not fit for adjudication. Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 163 (1967); see also Renne v. Geary, 501 U.S. 312, 321-322 (1991).

Even if there were greater certainty regarding ultimate implementation of paragraphs (a)(7) and (a)(8) of the statute, we do not think Texas's claim would be ripe. Ripeness “requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). As to fitness of the issues: Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, “[d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.” Longshoremen v. Boyd, 347 U.S. 222, 224 (1954). In the present case, the remoteness and abstraction are increased by the fact that Chapter 39 has yet to be interpreted by the Texas courts.

And as for hardship to the parties: This is not a case like Abbott Laboratories v. Gardner, supra, at 152, where the regulation at issue had a “direct effect on the day-to-day business” of the plaintiffs, because they were compelled to affix required labeling to their products under threat of criminal sanction. Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies. To be sure, if that contingency should arise compliance with the preclearance procedure could delay much needed action. (Prior to this litigation, Texas sought preclearance for the appointment of a master in a Dallas County school district, and despite a request for expedition the Attorney General took 90 days to give approval. See Brief for Petitioner 37, n. 28.) But even that inconvenience is avoidable. If Texas is confident that the imposition of a master or management team does not constitute a change affecting voting, it should simply go ahead with the appointment. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction. See Presley v. Etowah County Comm’n, 502 U.S. 491, 506 (1992); City of Lockhart v. United States, 460 U.S. 125, 129, n. 3 (1983). Texas claims that it suffers the immediate hardship of a “threat to federalism.” But that is an abstraction – and an abstraction no graver than the “threat to personal freedom” that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected. Cf. Toilet Goods Assn., supra, at 164.

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§ 4.2 Mootness Doctrine

Because Article III speaks in terms of “Cases” and “Controversies,” the Court will not render an advisory opinion, as discussed at § 3.3.1 nn.20-23. Similarly, federal courts will not render an opinion if there is no on-going controversy. For example, a “collusive suit” involves a case where the parties on both sides want the same result, and are only nominally on opposite sides of the litigation. In such a case, there is the “absence of a genuine adversary issue between the parties.”

In contrast, a “test case” is different. In a “test case” there is an adversary issue between the parties, even though the particular act that gave rise to the controversy may have been planned to raise that issue in court. While there usually is jurisdiction to hear a “test case,” the Court is likely to be sensitive to the contrived nature of the case, and, particularly in cases involving constitutional challenges, exercise prudence in deciding whether to decide the case, especially if the facts suggest some conflict of interest, such as the attorney for one side having connections to the opposing side.

Just as federal courts do not give advisory opinions or decide collusive lawsuits, they also will not decide a case which, by the time for decision or review, is moot, that is, is no longer an actual dispute because it no longer touches legal relations of parties having adverse legal interests. For example, in *DeFunis v. Odegaard,* the plaintiff brought suit on his own behalf claiming reverse discrimination and asking for an injunction commanding his admission to law school. By the time the case reached the Court, he had been admitted to the law school and was in the final term of his final year. Thus, his status would not be affected by any view the Court might express on the matter.

As a matter of procedural law, the mootness rule applies even when the Court is reviewing the decision of a state court. A moot federal case will be vacated and remanded for dismissal; a state case will be vacated and remanded for proceedings in the state court.


26 North Carolina v. Rice, 404 U.S. 244 , 246 (1971) (federal case); Doremus v. Board of Education, 342 U.S. 429, 434 (1952) (state case). While normally the Court vacates any judgment rendered below, the Court noted in *Alvarez v. Smith,* 130 S. Ct. 576, 581 (2009), if the mootness arises from the party’s “settlement” of the case, rather than “happenstance,” the “losing party has voluntarily forfeited his legal remedy . . . [and] thereby surrender[ed] his claim . . . of vacatur.”
There are four main exceptions to the mootness doctrine. One exception is where the case is "capable of repetition, yet evading review." This occurs, for example, where there is a reasonable expectation that the same controversy will recur involving the same complaining party and yet the judicial order will always become moot by the time of appeal. One typical case of this kind involves challenges to election or ballot access laws. In most cases, by the time the case reaches the Supreme Court, the date of the election has passed, yet if the case were then dismissed as moot, the Court would never rule on election law issues. Another typical case involves challenges to abortion laws. In most of these cases, the women had already been forced to make some decision regarding an abortion prior to the case being decided by the Supreme Court.

Another exception involves “voluntary cessation of allegedly illegal conduct, which could reoccur.” A typical example of this kind of case involves civil rights challenges to government action, where the government has “voluntarily” ceased its behavior by the time the case reaches the courts. In these cases, the court must determine how likely it is that the voluntarily ceased conduct could reoccur. The cases can also arise in the context of environmental litigation, where the alleged polluter may have voluntarily ceased the conduct by the time of litigation.

A third exception to the mootness doctrine is where the plaintiff has brought a class action and there is a reasonable expectation that others similarly situated will face the same issue in the future. As the Court held in *Sosna v. Iowa*, a class action does not become moot because it has become moot as to the named plaintiffs in the class, as long as other parties in the class have an on-going dispute.

The fourth exception involves cases where collateral consequences still exist, even if the main complaint has been mooted. For example, in *Sibron v. New York*, the plaintiff was permitted to

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challenge the constitutionality of a criminal conviction even though the prison term had already been served. The individual’s case was not moot, even though the individual was out of prison, because of the collateral consequence of having a criminal record, which the individual wanted expunged. Similarly, in Powell v. McCormack,\textsuperscript{34} Congressman Powell’s main complaint that he should not have been excluded from the 90th Session of Congress was moot by the time the case got to the Supreme Court, because that session of Congress had already passed and Powell had been reelected to the 91st Session of Congress. Yet his case was not moot because the issue of whether he was constitutionally excluded from the prior session affected his seniority in Congress and the amount of his congressional pension, issues for which there was still a live controversy.

The Court has not been entirely of one mind with respect to whether the mootness doctrine and its exceptions are prudential principles or Article III requirements. The third and fourth exceptions listed above, ongoing class actions and cases where collateral consequences still exist, technically involve plaintiffs who have ongoing injuries. Since Article III is thereby met in those cases, the application of those exceptions clearly involve prudential considerations. There is a debate on the Court, however, concerning what part of the “capable of repetition, yet evading review” exception and “voluntarily ceased conduct but may reoccur” exception are matters of Article III requirement and what part are matters of prudential principle, as addressed in Honig v. Doe.

\textbf{Honig v. Doe}  
484 U.S. 305 (1988)

Justice BRENNAN delivered the opinion of the Court.

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 [Individualized Educational Program (IEP)] identified him as a socially and physically awkward 17-year-old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was “[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts.” App. 17. Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade, id., at 23; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding. Id., at 15-16.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the

\textsuperscript{34} 395 U.S. 486, 495-500 (1969).
child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Id., at 208. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed. The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable “to control verbal or physical outburst[s]” and exhibited a “[s]evere disturbance in relationships with peers and adults.” Id., at 123. Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. Id., at 136, 139, 155, 176. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by “attempt[ing] to cover his feelings of low self worth through aggressive behavior [...] primarily verbal provocations.” Id., at 136.

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A.P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. Id., at 111. Like earlier evaluations, the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a half-day schedule and suggested that the placement be undertaken on a trial basis. Id., at 112, 115.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior – which included stealing, extorting money from fellow students, and making sexual comments to female classmates – they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A.P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.
After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their [Education of the Handicapped Act (EHA)] claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined the school district from taking any disciplinary action other than a 2- or 5-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively, to enact guidelines governing local school responses to disability-related misconduct. Finally, the judge ordered the State to provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

II

At the outset, we address the suggestion, raised for the first time during oral argument, that this case is moot. Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. Nebraska Press Assn v. Stuart, 427 U.S. 539, 546 (1976); Preiser v. Newkirk, 422 U.S. 395, 401 (1975). That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires. Steffel v. Thompson, 415 U.S. 452, 459, n.10 (1974); Roe v. Wade, 410 U.S. 113, 125 (1973). In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EHA-mandated rights that gave rise to this suit.

Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21. See 20 U.S.C. § 1412(2)(B). It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State, see Tr. of Oral Arg. 23, 26, the Act would not govern the State's provision of those services, and thus the case is moot as to him. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a “free appropriate public education” within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is “capable of repetition, yet evading review.” Murphy v. Hunt, 455 U.S. 478, 482 (1982). Given Smith's continued eligibility for educational services under the EHA, the nature of his disability, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have little difficulty concluding that there is a “reasonable expectation,” ibid., that Smith would once again be subjected to a unilateral “change in placement” for conduct growing out of his disabilities were it not for the statewide injunctive relief issued below.
Notwithstanding respondent's undisputed right to a free appropriate public education in California, Justice Scalia argues in dissent that there is no “demonstrated probability” that Smith will actually avail himself of that right because his counsel was unable to state affirmatively during oral argument that her client would seek to reenter the state school system. We believe the dissent overstates the stringency of the “capable of repetition” test. Although Justice Scalia equates “reasonable expectation” with “demonstrated probability,” the very case he cites for this proposition described these standards in the disjunctive, see Murphy v. Hunt, 455 U.S., at 482 (“[T]here must be a ‘reasonable expectation’ or a ‘demonstrated probability’ that the same controversy will recur” (emphasis added)), and in numerous cases decided both before and since Hunt we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable. See, e.g., Burlington Northern R. Co. v. Maintenance of Way Employes, 481 U.S. 429, 436, n.4 (1987) (parties “reasonably likely” to find themselves in future disputes over collective-bargaining agreement); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 578 (1987) (O'Connor, J.) (“likely” that respondent would again submit mining plans that would trigger contested state permit requirement); Press-Enterprise Co. v. Superior Court of Cal., Riverside County, 478 U.S. 1, 6 (1986) (“It can reasonably be assumed” that newspaper publisher will be subjected to similar closure order in the future); Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 603 (1982) (same); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) (case not moot where litigant “faces some likelihood of becoming involved in same controversy in the future”) (dicta).

Chief Justice REHNQUIST, concurring.

I write separately on the mootness issue in this case to explain why I have joined Part II of the Court's opinion, and why I think reconsideration of our mootness jurisprudence may be in order when dealing with cases decided by this Court.

The present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed. This doctrine was clearly articulated in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), in which Justice Douglas noted that “[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.” Id., at 39. The rule has been followed fairly consistently over the last 30 years. See, e.g., Preiser v. Newkirk, 422 U.S. 395, (1975); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

All agree that this case was “very much alive” when the action was filed in the District Court, and very probably when the Court of Appeals decided the case. It is supervening events since the decision of the Court of Appeals which have caused the dispute between the majority and the dissent over whether this case is moot. Therefore, all that the Court actually holds is that these supervening events do not deprive this Court of the authority to hear the case. I agree with that holding, and would go still further in the direction of relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after our decision to grant certiorari or to note probable jurisdiction.
The Court implies in its opinion, and the dissent expressly states, that the mootness doctrine is based upon Art. III of the Constitution. There is no doubt that our recent cases have taken that position. See Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546 (1976); Preiser v. Newkirk, supra, 422 U.S., at 401; Sibron v. New York, 392 U.S. 40, 57 (1968); Liner v. Jafco, Inc., 375 U.S. 301, 306, n.3 (1964). But it seems very doubtful that the earliest case I have found discussing mootness, Mills v. Green, 159 U.S. 651 (1895), was premised on constitutional constraints; Justice Gray's opinion in that case nowhere mentions Art. III.

If it were indeed Art. III which – by reason of its requirement of a case or controversy for the exercise of federal judicial power – underlies the mootness doctrine, the “capable of repetition, yet evading review” exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are “capable of repetition, yet evading review.” If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are “moot” but which also raise questions which are capable of repetition but evading review than we would to decide cases which are “moot” but raise no such questions.

The exception to mootness for cases which are “capable of repetition, yet evading review,” was first stated by this Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). There the Court enunciated the exception in the light of obvious pragmatic considerations, with no mention of Art. III as the principle underlying the mootness doctrine: “The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.” Id., at 515.

The exception was explained again in Moore v. Ogilvie, 394 U.S. 814, 816 (1969): “The problem is therefore ‘capable of repetition, yet evading review.’ The need for its resolution thus reflects a continuing controversy in the federal-state area where our ‘one man, one vote’ decisions have thrust.” (citation omitted).

The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it. The “capable of repetition, yet evading review” exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some advanced stage of the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, n.10 (1982); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). I believe that we should adopt an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case. Dissents from denial of certiorari in this Court illustrate the proposition that the roughly 150 or 160 cases which we decide each year on the merits are less than
the number of cases warranting review by us if we are to remain, as Chief Justice Taft said many years ago, “the last word on every important issue under the Constitution and the statutes of the United States.” But these unique resources – the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring – are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case – we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts – is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here. I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is “capable of repetition, yet evading review.”

Justice SCALIA, with whom Justice O'CONNOR joins, dissenting.

Without expressing any views on the merits of this case, I respectfully dissent because in my opinion we have no authority to decide it. I think the controversy is moot.

The Court correctly acknowledges that we have no power under Art. III of the Constitution to adjudicate a case that no longer presents an actual, ongoing dispute between the named parties. Here, there is obviously no present controversy between the parties, since both respondents are no longer in school and therefore no longer subject to a unilateral “change in placement.” The Court concedes mootness with respect to respondent John Doe, who is now too old to receive the benefits of the Education of the Handicapped Act (EHA). It concludes, however, that the case is not moot as to respondent Jack Smith, who has two more years of eligibility but is no longer in the public schools, because the controversy is “capable of repetition, yet evading review.”

Jurisdiction on the basis that a dispute is “capable of repetition, yet evading review” is limited to the “exceptional situatio[n],” Los Angeles v. Lyons, 461 U.S. 95, 109 (1983), where the following two circumstances simultaneously occur: “(1) the challenged action [is] in its duration too short 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.” Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam), quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam). The second of these requirements is not met in this case.

For there to be a “reasonable expectation” that Smith will be subjected to the same action again, that event must be a “demonstrated probability.” Murphy v. Hunt, supra, 455 U.S., at 482, 483; Weinstein v. Bradford, supra, 423 U.S., at 149. I am surprised by the Court's contention, fraught with potential for future mischief, that “reasonable expectation” is satisfied by something less than “demonstrated probability.” [See FN 6 of the Court’s opinion] No one expects that to happen which he does not think probable; and his expectation cannot be shown to be reasonable unless the probability is demonstrated.
The Chief Justice joins the majority opinion on the ground, not that this case is not moot, but that where the events giving rise to the mootness have occurred after we have granted certiorari we may disregard them, since mootness is only a prudential doctrine and not part of the “case or controversy” requirement of Art. III. I do not see how that can be. There is no more reason to intuit that mootness is merely a prudential doctrine than to intuit that initial standing is. Both doctrines have equivalently deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition. See Flast v. Cohen, 392 U.S. 83, 95 (1968) (describing mootness and standing as various illustrations of the requirement of “justiciability” in Art. III).

In sum, I cannot believe that it is only our prudence, and nothing inherent in the understood nature of “The judicial Power,” U.S. Const., Art. III, § 1, that restrains us from pronouncing judgment in a case that the parties have settled, or a case involving a nonsurviving claim where the plaintiff has died, or a case where the law has been changed so that the basis of the dispute no longer exists, or a case where conduct sought to be enjoined has ceased and will not recur. Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist, and Art. III is no more violated than it is violated by entertaining a declaratory judgment action. But that is the limit of our power. I agree with the Chief Justice to this extent: the “yet evading review” portion of our “capable of repetition, yet evading review” test is prudential; whether or not that criterion is met, a justiciable controversy exists. But the probability of recurrence between the same parties is essential to our jurisdiction as a court, and it is that deficiency which this case presents.

It is assuredly frustrating to find that a jurisdictional impediment prevents us from reaching the important merits issues that were the reason for our agreeing to hear this case. But we cannot ignore such impediments for purposes of our appellate review without simultaneously affecting the principles that govern district courts in their assertion or retention of original jurisdiction. We thus do substantial harm to a governmental structure designed to restrict the courts to matters that actually affect the litigants before them.

§ 4.3 Political Questions Doctrine

1. The Political Questions Doctrine in Historical Perspective

A. The Original Natural Law Era: 1789-1873

The roots of the political question doctrine trace back to a 1794 speech by John Marshall. He said that for the judiciary to answer a question it must assume a legal form for litigation by parties.  

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Chief Justice Marshall also indicated in *Marbury v. Madison* that “the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.”

The earliest case where the political questions doctrine was applied to find an issue a political question was *Luther v. Borden*. The question in *Luther* involved the Guarantee Clause of Article IV, § 4, which provides, “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.” In *Luther*, the Court declined to find under the Guarantee Clause which of two groups was the legitimate government of Rhode Island, leaving it to Congress and the President to intervene, if necessary, to resolve the issue and disarm the factions.

**B. The Formalist Era: 1873-1937**

During the formalist era, a Guarantee Clause challenge to the state of Kentucky's procedure in a contested gubernatorial election was held nonjusticiable in *Taylor v. Beckham*. In a case involving Oregon's initiative and referendum process, the Court held in *Pacific States Telephone & Telegraph Co. v. Oregon* that the question of whether a state has a republican form of government is political in character. The Court also held that a proclamation by the Secretary of State that the 19th Amendment was ratified by enough states was a political question conclusive upon the courts in *Leser v. Garnett*.

In these cases, the Court seemed to adopt a bright-line categorical approach that any case raising a Guarantee Clause or Ratification issue was a political question, although in 1874 the Court had noted in passing in *Minor v. Happersatt* that denying women the right to vote did not deprive any state of a republican form of government, a decision consistent with historical practice denying

36 5 U.S. (1 Cranch.) 137, 164 (1803).

37 48 U.S. (7 How.) 1 (1849).


39 178 U.S. 548, 573-74 (1900).

40 223 U.S. 118, 143-51 (1912).

41 258 U.S. 130, 137 (1922).

42 88 U.S. 162, 175-78 (1874).
women the right to vote in 18th- and 19th-century America, as in other democracies at the time. Voting rights for women began in some democracies in the late 19th century and accelerated during the 20th century.

C. The Holmesian Era: 1937-1954

Holmesian deference led to an increased number of decisions in which the Court found that certain kinds of questions were political and thus for the other branches of government to resolve. The Holmesian-era Courts found that not only Ratification or Guarantee Clause issues were political questions, but also that aspects of the President’s foreign affairs power present a political question. For example, in *United States v. Pink*, the Court deferred to the President when holding that deciding which government represents a foreign state is a political question. Speaking more broadly, the Court said in *Chicago & S. Air Lines v. Waterman S.S. Corp.* that the Constitution gives the President the exclusive right to make foreign policy decisions. Regarding the Ratification Clause, the Court held in *Coleman v. Miller* that it was exclusively for Congress to resolve questions on the time within which an Amendment may be ratified, and the legal effects of a state first rejecting and later attempting to ratify an Amendment. In a challenge under the Guarantee Clause, the Court held in *Colgrove v. Green* that state malapportionment of congressional districts was a political question.

D. The Instrumentalist Era: 1954-1986

The modern era of political questions doctrine traces its roots to the Supreme Court’s decision in 1962 in *Baker v. Carr*, excerpted at § 4.3.2. Stressing that the challenge to a state reapportionment in *Baker v. Carr* was brought under the Equal Protection Clause, rather than the Guarantee Clause, and thus *Colgrove* could be distinguished, Justice Brennan’s opinion changed the way in which the Court decides whether a question is political.

First, Justice Brennan said that the nonjusticiability of political questions is primarily due to the separation of powers doctrine. Accordingly, there is need for a case-by-case inquiry into precise facts, without use of any semantic cataloguing. That gave him an opening to challenge statements in earlier cases as too sweeping. As Justice Brennan analyzed the prior cases, he did not conclude that they had held that every Guarantee Clause, or Ratification issue, or use of Presidential power in foreign affairs, raised only political questions. Instead, he concluded that the Court had looked

43 315 U.S. 203, 229 (1942).
44 333 U.S. 103, 111-12 (1948).
46 328 U.S. 549, 556 (1946).
carefully at the history of a question's management by political branches, whether it was susceptible to judicial handling, and the consequences of judicial action on separation of power concerns.48

Based upon this reasoning, Justice Brennan then abandoned any attempt to classify based on the clause or the question. Instead, he announced that "prominent on the surface of any case held to involve a political question is found one or more of six factors." These six factors stated in Baker v. Carr, (a) - (f), can be conveniently grouped into three categories:

1. a textual concern whether there exists (a) a textually demonstrable constitutional commitment of the issue to a coordinate branch of government;
2. a separation of powers concern with whether (b) there are judicially manageable standards or (c) the issue calls for an initial non-judicial policy decision; and
3. a prudential concern counseling against judicial intervention, such as a special concern with (d) expressing lack of respect for a coordinate branch of government, (e) a need for finality, or (f) potential embarrassment from multifarious pronouncements if the court second-guessed how the coordinate branch has acted.49

Justice Brennan said that unless one or more of these factors is "inextricable" from the case at bar there should not be a dismissal on grounds of a political question. Through this opinion, Justice Brennan provided the Court with concepts and techniques that would enable the Court to expand its power by reaching the merits in many more cases than if the Court had continued to use the broad categories of the formalist and Holmesian eras, such as simply noting that a Clause, such as the Guarantee Clause, or the general subject matter, such as foreign relations, was involved in the case.

Justice Brennan's case-by-case approach was applied by Chief Justice Warren, writing in Powell v. McCormack.50 Warren held that although Art. I, § 5 is a textually demonstrable commitment to the House of Representatives of power to judge qualifications expressly set forth in the Constitution, the Court is not deciding a political question when it interprets the Constitution to forbid the House to add additional qualifications to those listed in the Constitution, and thus to exclude from Congress a person duly elected by constituents who meets all three of the expressed requirements for membership – age, citizenship, and residence. Warren noted that if the Constitution is interpreted in light of the principle that the people may choose whom they please to govern, the Court's holding did not present an embarrassing confrontation between the Court and Congress. Nor were any other political question factors "inextricable from the case at bar" because the Court was merely engaged in traditional constitutional interpretation. Indeed, the decision that Congress may not add qualifications to those listed in the Constitution is similar to the Court’s conclusion in Marbury v. Madison that Congress cannot add cases to the Supreme Court’s original jurisdiction.

48 Id. at 209-17.


Another decision applying the *Baker v. Carr* factors is *Davis v. Bandemer*. In this case, the Court decided that a state’s political gerrymandering might violate the Equal Protection Clause, and was not a political question. In reaching this conclusion, the instrumentalists on the Court were joined by Justice White, as they often were concerning enforcement of federal remedies for alleged constitutional violations, and by moderate natural law Justice Powell. Three Justices dissented. In her dissent, joined by Chief Justice Burger and Justice Rehnquist, Justice O’Connor said that the Court had not found any judicially manageable standards to determine when such a gerrymander was a violation, and the issue is a classic issue which calls for a non-judicial policy decision by political actors in each state. O’Connor noted that political gerrymandering cases are different than the “one person, one vote” standard for population malapportionment, involved in *Baker v. Carr*, or cases involving racial discrimination in redistricting, where the Court has been able to develop agreed-upon standards of review. Reflecting the difficulty in determining a test for the constitutionality of a political gerrymander, a 4-Justice plurality of Justices Brennan, White, Marshall, and Blackmun adopted one approach, while Justices Powell and Stevens adopted a different approach.

During the instrumentalist era, however, some issues were found to be political questions under the *Baker v. Carr* doctrine. For example, in *Gilligan v. Morgan*, the plaintiff sought an injunction with respect to training the national guard so it would not deny due process by using fatal force in suppressing civilian disorders. The Court said that Art. I, § 8, cl. 16 vested training of the militia to Congress. Chief Justice Burger’s opinion also spoke of the lack of judicial competence and the separation of powers concern that control of the military should be in the hands of elected persons, although Burger’s opinion did note, consistent with *Baker v. Carr*’s case-by-case approach, that “we neither hold nor imply that the conduct of the National Guard is always beyond judicial review.”

The issue of the constitutionality of the United States military action in Vietnam was presented to lower courts during the 1960s and 1970s, since Congress never formally declared war against Vietnam, passing only the “Gulf of Tonkin Resolution.” A number of lower courts ruled that issues surrounding the legality of military action in Vietnam were political questions, applying the factors in *Baker v. Carr*, but the Supreme Court never took certiorari in any of those cases.

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52 Id. at 147-61 (O’Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

53 Id. at 135-43 (plurality opinion of White, J., joined by Brennan, Marshall & Blackmun, JJ.); id. at 161-62 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part).

54 413 U.S. 1, 10-12 (1973).

A final important instrumentalist-era case involving the political questions doctrine is *Goldwater v. Carter.* In *Goldwater,* members of Congress sought a declaration that President Carter's termination of a treaty with Taiwan, which was based on the President Carter's decision to recognize the People's Republic of China as the official government of China, not Taiwan, deprived Congress of their constitutional role in making law. The Court dismissed without a majority opinion. For four Justices, Justice Rehnquist reasoned broadly in a pre-*Baker v. Carr* style, relying on the Holmesian-era case of *Coleman v. Miller,* to conclude that whether the President alone may recognize or withdraw recognition from foreign governments was a political question. *Coleman* was directly analogous, said Justice Rehnquist, because the Constitution has express text on how the Senate participates in the ratification of a treaty, but is silent on its participation in the abrogation of a Treaty, and different termination procedures might be appropriate for different treaties. Since the Constitution is silent on the matter, there are no judicially manageable standards to govern court review, and thus the matter “must surely be controlled by political standards.”

Justice Powell, who usually wrote from the natural law perspective, applied the factor analysis of *Baker v. Carr* to find that the issue in the case was not a political question. He said no constitutional provision unquestionably commits the power to terminate treaties to the President alone, there was no lack of judicially discoverable and manageable standards for resolving a case of presidential power, and no special considerations regarding mutual respect called for the Court to avoid deciding the case. Further, if the case were ripe, a decision would eliminate multiple interpretations. However, since Congress had remained silent and there was no impasse, the case was not ripe for resolution.

Justice Brennan agreed with Justice Powell that the political question doctrine did not always apply when the question was whether a particular branch has been constitutionally designated as the repository of political decision-making power. On the merits, he would hold that the President alone has power to recognize and withdraw recognition from foreign governments. Justices White and Blackmun voted to set the case for argument. Marshall concurred in the result to remand the case to the district court with instructions to dismiss the complaint.

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57 *Id.* at 996-97, 998-1002 (Powell, J., concurring in the judgment).

58 *Id.* at 1002.

59 *Id.* at 1006-07 (Brennan, J., would grant the petition for certiorari and affirm the judgment of the Court of Appeals, which held that the President has that recognition power).

60 *Id.* at 997, 1006 (Blackmun, J., joined by White, J., would grant the petition for certiorari and set the case for oral argument); *id.* at 996 (Marshall, J., concurs in the result).

Two relatively easy cases involving the political questions doctrine decided since 1986 are United States v. Munoz-Flores and New York v. United States. In Munoz-Flores,\(^{61}\) the Court held that whether a law was passed in violation of the Origination Clause, which requires bills for raising revenue to originate in the House of Representatives, was not a political question. The Court concluded that just as judicially manageable standards existed in Powell v. McCormack to determine congressional power under the Qualifications Clause, judicial manageable standards existed to determine congressional power under the Origination Clause. On the merits, the Court then held that a statute creating a particular program and raising revenue for that program was not a bill for raising revenue within the Origination Clause.

In New York v. United States,\(^{62}\) the Court raised, but did not have to decide, the question whether cases brought under the Guarantee Clause are always nonjusticiable, or whether a better rule would be that the nature of a claim, rather than the nature of the clause, should determine whether the claim was justiciable. The fact that the Court left the question open, however, suggests a predisposition to continue repudiation of the category approach of the pre-instrumentalist era, and follow the case-by-case approach adopted in Baker v. Carr. The Guarantee Clause issue could be avoided in New York because the case was decided under the 10th Amendment.

Given the natural law respect for precedent, for reasoned elaboration of the law, and a predisposition to decide cases on a fact-by-fact basis, it is likely that political questions doctrine will continue to be determined by the six-factor Baker v. Carr approach. However, without the instrumentalist predisposition to find cases are not political questions so the Court can rule on the merits of the lawsuit, the make-up of the Court today suggests that it will likely find more questions are political questions than did the instrumentalist Court, as suggested by the cases of Vieth v. Jubelirer, excerpted below, and Nixon v. United States, excerpted below. Lower federal courts have similarly adopted a willingness to find cases are political questions.\(^{63}\)

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\(^{63}\) See also Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006) (claims against the United States and its former national security advisor for supporting 1970 Chilean coup and kidnapping and murder of Chilean general by plotters raised foreign policy questions committed to the executive branch, no judicially manageable standards exist to determine propriety of executive action, and adjudication requires policy determinations not within judicial competence); United States v. Mandel, 914 F.2d 1215, 1223 (9th Cir. 1990) (whether to place items on a “commodity control” list is “quintessentially matters of policy entrusted by the Constitution to the Congress and the President, for which there are not meaningful standards of judicial review.”).
On the other hand, sometimes it is clear to a majority of the Court that an issue is not a political question. For example, in Zivotofsky v. Clinton, an 8-1 Court held that the political questions doctrine does not bar a court from considering whether a congressional statute which provides that Americans born in Jerusalem may elect to have “Israel” listed as their place of birth on their passports is constitutional. A conflict exists because the State Department has declined to follow the law, citing its long-standing policy of not taking a position on the political status of Jerusalem. Justice Breyer dissented, viewing the issue as a political question based on Baker v. Carr.

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**Baker v. Carr**

369 U.S. 186 (1962)

Justice BRENNAN delivered the opinion of the Court.

This civil action was brought under 42 U. S. C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes," was dismissed by a three-judge court convened under 28 U. S. C. § 2281 in the Middle District of Tennessee. The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F.Supp. 824. We noted probable jurisdiction of the appeal. 364 U.S. 898. We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion.

In holding that the subject matter of this suit was not justiciable, the District Court relied on Colegrove v. Green, supra, [328 U.S. 549 (1946)] and subsequent per curiam cases. The court stated: "From a review of these decisions there can be no doubt that the federal rule . . . is that the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." 179 F.Supp., at 826.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted Colegrove v. Green and other decisions of this Court on which it relied. Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right to relief under the equal protection clause is not

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64 132 S. Ct. 1421 (2012).

65 Id. at 1437 (Breyer, J., dissenting). On remand, the District of Columbia Court of Appeals held the law unconstitutional as infringing on the President’s power to decide whether and on what terms to recognize foreign governments. Zivotofsky ex rel. Zivotofsky v. Secretary of State, 725 F.3d 197 (D.C. Cir. 2013), aff'd, 135 S. Ct. 2076 (2015), discussed infra at § 11.2.
diminished by the fact that the discrimination relates to political rights." Snowden v. Hughes, 321 U.S. 1, 11.

To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the "political question" doctrine.

Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine – attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we of course do not explore their implications in other contexts. That review reveals that in the Guaranty Clause cases and in the other "political question" cases, 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."

We have said that "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. 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. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations: 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 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. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. Compare Terlinden v. Ames, 184 U.S. 270, 285, with Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 8 Wheat. 464, 492-495. Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. The Three Friends, 166 U.S. 1, 63, 66. Still again, though it is the executive that determines a person's status as representative of a foreign government, Ex parte Hitz, 111 U.S. 766, the executive's statements will be construed where necessary to determine the court's jurisdiction, In re Baiz, 135 U.S. 403. Similar judicial action in the absence of a recognizably authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments. Compare Ex parte Peru, 318 U.S. 578, with Mexico v. Hoffman, 324 U.S. 30, 34-35.

It is apparent that several formulations which vary slightly according to the settings 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.

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.
We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Justice WHITTAKER did not participate in the decision of this case.

Justice FRANKFURTER, whom Justice HARLAN joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation – a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful – in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation – ultimately, really, among competing theories of political philosophy – in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

Justice HARLAN, whom Justice FRANKFURTER joins, dissenting.

Once one cuts through the thicket of discussion devoted to "jurisdiction," "standing," "justiciability," and "political question," there emerges a straightforward issue which, in my view, is determinative.
of this case. Does the complaint disclose a violation of a federal constitutional right, in other words, a claim over which a United States District Court would have jurisdiction under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983? The majority opinion does not actually discuss this basic question, but, as one concurring Justice observes, seems to decide it "sub silentio." However, in my opinion, appellants' allegations, accepting all of them as true, do not, parsed down or as a whole, show an infringement by Tennessee of any rights assured by the Fourteenth Amendment. Accordingly, I believe the complaint should have been dismissed for "failure to state a claim upon which relief can be granted." Fed. Rules Civ. Proc., Rule 12 (b)(6).

It is at once essential to recognize this case for what it is. The issue here relates not to a method of state electoral apportionment by which seats in the federal House of Representatives are allocated, but solely to the right of a State to fix the basis of representation in its own legislature. Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this instance runs afoul of any such limitation, we need not reach the issues of "justiciability" or "political question" or any of the other considerations which in such cases as Colegrove v. Green, 328 U. S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the federal House of Representatives, in the absence of a controlling Act of Congress. See also Wood v. Broom, 287 U. S. 1.

The appellants' claim in this case ultimately rests entirely on the Equal Protection Clause of the Fourteenth Amendment. It is asserted that Tennessee has violated the Equal Protection Clause by maintaining in effect a system of apportionment that grossly favors in legislative representation the rural sections of the State as against its urban communities. Stripped to its essentials the complaint purports to set forth three constitutional claims of varying breadth:

(1) The Equal Protection Clause requires that each vote cast in state legislative elections be given approximately equal weight.

(2) Short of this, the existing apportionment of state legislators is so unreasonable as to amount to an arbitrary and capricious act of classification on the part of the Tennessee Legislature, which is offensive to the Equal Protection Clause.

(3) In any event, the existing apportionment is rendered invalid under the Fourteenth Amendment because it flies in the face of the Tennessee Constitution.

I can find nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter. Not only is that proposition refuted by history, as shown by my Brother Frankfurter, but it strikes deep into the heart of our federal system. Its acceptance would require us to turn our backs on the regard which this Court has always shown for the judgment of state legislatures and courts on matters of basically local concern.

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In *Reynolds v. Sims*, 377 U.S. 533 (1964), excerpted at § 24.1, the Court held that the Equal Protection Clause requires that both houses of a state legislature must be apportioned on a population basis. This principle requires that a state must make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. This doctrine of “one person/one vote” applies with even greater rigor to drawing congressional districts for the federal House of Representatives, as discussed at § 24.1 n.4.

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**Vieth v. Jubeliver**


Justice SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice O’CONNOR and Justice THOMAS, join.

Plaintiffs-appellants Richard Vieth, Norma Jean Vieth, and Susan Furey challenge a map drawn by the Pennsylvania General Assembly establishing districts for the election of congressional Representatives, on the ground that the districting constitutes an unconstitutional political gerrymander. In *Davis v. Bandemer*, 478 U.S. 109 (1986), this Court held that political gerrymandering claims are justiciable, but could not agree upon a standard to adjudicate them. The present appeal presents the questions whether our decision in *Bandemer* was in error, and, if not, what the standard should be.

The facts, as alleged by the plaintiffs, are as follows. The population figures derived from the 2000 census showed that Pennsylvania was entitled to only 19 Representatives in Congress, a decrease in 2 from the Commonwealth's previous delegation. Pennsylvania's General Assembly took up the task of drawing a new districting map. At the time, the Republican party controlled a majority of both state Houses and held the Governor's office. Prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere. The Republican members of Pennsylvania's House and Senate worked together on such a plan. On January 3, 2002, the General Assembly passed its plan, which was signed into law by Governor Schweiker as Act 1.

Plaintiffs, registered Democrats who vote in Pennsylvania, brought suit in the United States District Court for the Middle District of Pennsylvania, seeking to enjoin implementation of Act 1 under Rev Stat § 1979, 42 U.S.C. § 1983. Defendants-appellees were the Commonwealth of Pennsylvania and various executive and legislative officers responsible for enacting or implementing Act 1. The complaint alleged, among other things, that the legislation created malapportioned districts, in violation of the one-person, one-vote requirement of Article I, § 2, of the United States Constitution, and that it constituted a political gerrymander, in violation of Article I and the Equal Protection Clause of the Fourteenth Amendment. With regard to the latter contention, the complaint alleged that the districts created by Act 1 were "meandering and irregular," and "ignor[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage." Juris. Statement 136a, P 22, 135a, P 20.
As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights. See, e.g., Nixon v. United States, 506 U.S. 224 (challenge to procedures used in Senate impeachment proceedings); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (claims arising under the Guaranty Clause of Article IV, § 4). Such questions are said to be "nonjusticiable," or "political questions."

In Baker v. Carr, 369 U.S. 186 (1962), we set forth six independent tests for the existence of a political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Id. at 217.

These tests are probably listed in descending order of both importance and certainty. The second is at issue here, and there is no doubt of its validity. "The judicial Power" created by Article III, § 1, of the Constitution is not whatever judges choose to do, see Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 (1982); cf. Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332-333 (1999), or even whatever Congress chooses to assign them, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-577 (1992); Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 110-114 (1948). It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

Over the dissent of three Justices, the Court held in Davis v. Bandemer that, since it was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided," 478 U.S. 109, at 123, such cases were justiciable. The clumsy shifting of the burden of proof for the premise (the Court was "not persuaded" that standards do not exist, rather than "persuaded" that they do) was necessitated by the uncomfortable fact that the six-Justice majority could not discern what the judicially discernable standards might be. There was no majority on that point. Four of the Justices finding justiciability believed that the standard was one thing, see id., at 127 (plurality opinion of White, J., joined by Brennan, Marshall, and Blackmun, JJ.); two believed it was something else, see id. 161 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part). The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years. In that time, they have considered numerous political gerrymandering claims; this Court has never revisited the unanswered question of what standard governs.
Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in Bandemer’s four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time – but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney’s fees) as would have obtained if the question were nonjusticiable: judicial intervention has been refused. As one commentary has put it, "[t]hroughout its subsequent history, Bandemer has served almost exclusively as an invitation to litigation without much prospect of redress." S. Issacharoff, P. Karlan, & R. Pildes, The Law of Democracy 886 (rev. 2d ed. 2002). The one case in which relief was provided (and merely preliminary relief, at that) did not involve the drawing of district lines; in all of the cases we are aware of involving that most common form of political gerrymandering, relief was denied. Moreover, although the case in which relief was provided seemingly involved the ne plus ultra of partisan manipulation, we would be at a loss to explain why the Bandemer line should have been drawn just there, and should not have embraced several districting plans that were upheld despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results. See, e.g., Session v. Perry, 298 F. Supp. 2d 451 (ED Tex. 2004) (per curiam); O’Lear v. Miller, 222 F. Supp. 2d 850 (ED Mich. 2002), summarily aff’d, 537 U.S. 997 (2002); Badham v. Eu, 694 F. Supp. 664, 670 (ND Cal. 1988), summarily aff’d, 488 U.S. 1024 (1989). To think that this lower-court jurisprudence has brought forth "judicially discernible and manageable standards" would be fantasy.

Justice Stevens concurs in the judgment that we should not address plaintiffs’ statewide political gerrymandering challenges. Though he reaches that result via standing analysis, while we reach it through political-question analysis, our conclusions are the same: these statewide claims are nonjusticiable.

Justice Stevens would, however, require courts to consider political gerrymandering challenges at the individual-district level. Much of his dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to "try" impeachments. See Nixon v. United States, 506 U.S. 224 (1993). The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy. On that point, Justice Stevens's dissent is less helpful, saying, essentially, that if we can do it in the racial gerrymandering context we can do it here.

Justice Souter, like Justice Stevens, would restrict these plaintiffs, on the allegations before us, to district-specific political gerrymandering claims. Unlike Justice Stevens, however, Justice Souter recognizes that there is no existing workable standard for adjudicating such claims. He proposes a "fresh start," a newly constructed standard loosely based in form on our Title VII cases, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and complete with a five-step prima facie test sewn together from parts of, among other things, our Voting Rights Act jurisprudence, law review articles, and apportionment cases. Even if these self-styled "clues" to unconstitutionality
could be manageably applied, which we doubt, there is no reason to think they would detect the constitutional crime which Justice Souter is investigating – an "extremity of unfairness" in partisan competition.

We agree with much of Justice Breyer's dissenting opinion, which convincingly demonstrates that "political considerations will likely play an important, and proper, role in the drawing of district boundaries." This places Justice Breyer, like the other dissenters, in the difficult position of drawing the line between good politics and bad politics. Unlike them, he would tackle this problem at the statewide level.

The criterion Justice Breyer proposes is nothing more precise than "the unjustified use of political factors to entrench a minority in power." While he invokes in passing the Equal Protection Clause, it should be clear to any reader that what constitutes unjustified entrenchment depends on his own theory of "effective government." While one must agree with Justice Breyer's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government, ibid., that is a long and impassable distance away from the conclusion that the judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent unjustified political machinations (whatever that means).

Justice Kennedy recognizes that we have "demonstrat[ed] the shortcomings of the other standards that have been considered to date." He acknowledges, moreover, that we "lack . . . comprehensive and neutral principles for drawing electoral boundaries," and that there is an "absence of rules to limit and confine judicial intervention," ibid. From these premises, one might think that Justice Kennedy would reach the conclusion that political gerrymandering claims are nonjusticiable. Instead, however, he concludes that courts should continue to adjudicate such claims because a standard may one day be discovered.

The first thing to be said about Justice Kennedy's disposition is that it is not legally available. The District Court in this case considered the plaintiffs' claims justiciable but dismissed them because the standard for unconstitutionality had not been met. It is logically impossible to affirm that dismissal without either (1) finding that the unconstitutional-districting standard applied by the District Court, or some other standard that it should have applied, has not been met, or (2) finding (as we have) that the claim is nonjusticiable. Justice Kennedy seeks to affirm "[b]ecause, in the case before us, we have no standard." But it is our job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim. We cannot nonsuit them for our failure to do so.

Justice Kennedy asserts that to declare nonjusticiability would be incautious. Our rush to such a holding after a mere 18 years of fruitless litigation "contrasts starkly" he says, "with the more patient approach" that this Court has taken in the past. We think not.
The only cases Justice Kennedy cites in defense of his never-say-never approach are *Baker v. Carr* and *Bandemer*. *Bandemer* provides no cover. There, all of the Justices who concluded that political gerrymandering claims are justiciable proceeded to describe what they regarded as the discernible and manageable standard that rendered it so. The lower courts were set wandering in the wilderness for 18 years not because the *Bandemer* majority thought it a good idea, but because five Justices could not agree upon a single standard, and because the standard the plurality proposed turned out not to work.

As for *Baker v. Carr*: It is true enough that, having had no experience whatever in apportionment matters of any sort, the Court there refrained from spelling out the equal-protection standard. (It did so a mere two years later in *Reynolds v. Sims*.) But the judgment under review in *Baker*, unlike the one under review here, did not demand the determination of a standard. The lower in *Baker* had held the apportionment claim of the plaintiffs *nonjusticiable*, and so it was logically possible to dispose of the appeal by simply disagreeing with the nonjusticiability determination. As we observed earlier, that is not possible here, where the lower court has held the claim *justiciable* but unsupported by the facts. We must either enunciate the standard that causes us to agree or disagree with that merits judgment, or else affirm that the claim is beyond our competence to adjudicate.

Justice Kennedy worries that "[a] determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene." But it is the function of the courts to provide relief, not hope. What we think would erode confidence is the Court's refusal to do its job – announcing that there may well be a valid claim here, but we are not yet prepared to figure it out. Moreover, that course does more than erode confidence; by placing the district courts back in the business of pretending to afford help when they in fact can give none, it deters the political process from affording genuine relief.

Considerations of *stare decisis* do not compel us to allow *Bandemer* to stand. That case involved an interpretation of the Constitution, and the claims of *stare decisis* are at their weakest in that field, where our mistakes cannot be corrected by Congress. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). They are doubly weak in *Bandemer* because the majority's inability to enunciate the judicially discernible and manageable standard that it thought existed (or did not think did not exist) presaged the need for reconsideration in light of subsequent experience. And they are triply weak because it is hard to imagine how any action taken in reliance upon *Bandemer* could conceivably be frustrated.

While we do not lightly overturn one of our own holdings, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Id.,* at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims.

The judgment of the District Court is affirmed.
Justice KENNEDY, concurring in the judgment.

A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation’s political life. While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.

The plurality thinks I resolve this case with reference to no standard, but that is wrong. The Fourteenth Amendment standard governs; and there is no doubt of that. My analysis only notes that if a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants’ evidence states a provable claim under the Fourteenth Amendment standard.

Still, the Court's own responsibilities require that we refrain from intervention in this instance. The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief. With these observations, I join the judgment of the plurality.

Justice STEVENS, dissenting.

The central question presented by this case is whether political gerrymandering claims are justiciable. Although our reasons for coming to this conclusion differ, five Members of the Court are convinced that the plurality’s answer to that question is erroneous. Moreover, as is apparent from our separate writings today, we share the view that, even if these appellants are not entitled to prevail, it would be contrary to precedent and profoundly unwise to foreclose all judicial review of similar claims that might be advanced in the future. That we presently have somewhat differing views – concerning both the precedential value of some of our recent cases and the standard that should be applied in future cases – should not obscure the fact that the areas of agreement set forth in the separate opinions are of far greater significance.

The concept of equal justice under the law requires the State to govern impartially. See Romer v. Evans, 517 U.S. 620, 623 (1996); Lehr v. Robertson, 463 U.S. 248, 265 (1983); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979). Today’s plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification. In my view, when partisanship is the legislature’s sole motivation – when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage – the governing body cannot be said to have acted impartially.
The plurality reasons that the standards for evaluating racial gerrymanders are not workable in cases such as this because partisan considerations, unlike racial ones, are perfectly legitimate. Until today, however, there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line. "[T]he word 'rational' – for me at least – includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring). A legislature controlled by one party could not, for instance, impose special taxes on members of the minority party, or use tax revenues to pay the majority party's campaign expenses. The rational basis for government decisions must satisfy a standard of legitimacy and neutrality; an acceptable rational basis can be neither purely personal nor purely partisan. See id., at 452-453.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

The plurality says, in effect, that courts have been trying to devise practical criteria for political gerrymandering for nearly 20 years, without being any closer to something workable than we were when Davis was decided. While this is true enough, I do not accept it as sound counsel of despair. For I take it that the principal reason we have not gone from theoretical justiciability to practical administrability in political gerrymandering cases is the Davis plurality's specification that any criterion of forbidden gerrymandering must require a showing that members of the plaintiff's group had "essentially been shut out of the political process," 478 U.S. at 139. See, e.g., Badham v. Eu, 694 F. Supp. 664, 670-671 (ND Cal 1988) (three-judge court). That is, in order to avoid a threshold for relief so low that almost any electoral defeat (let alone failure to achieve proportionate results) would support a gerrymandering claim, the Davis plurality required a demonstration of such pervasive devaluation over such a period of time as to raise real doubt that a case could ever be made out. Davis suggested that plaintiffs might need to show even that their efforts to deliberate, register, and vote had been impeded. 478 U.S. at 133. This standard, which it is difficult to imagine a major party meeting, combined a very demanding burden with significant vagueness; and if appellants have not been able to propose a practical test for a Davis violation, the fault belongs less to them than to our predecessors. As Judge Higginbotham recently put it, "[i]t is now painfully clear that Justice Powell's concern that [Davis] offered a "constitutional green light" to would-be gerrymanderers has been realized." Session v. Perry, 298 F. Supp. 2d 451, 474 (ED Tex 2004) (quoting Davis, supra, at 173 (Powell, J., concurring in part and dissenting in part)).

Since this Court has created the problem no one else has been able to solve, it is up to us to make a fresh start. There are a good many voices saying it is high time that we did, for in the years since Davis, the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine. E.g., Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 624 (2002) (The "pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved"); Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders"); Pildes, Principled Limitations on Racial and Partisan Restricting, 106 Yale L. J. 2505, 2553-2554 (1997) ("Recent cases now document in microscopic
detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences"). See also Morrill, A Geographer's Perspective, in Political Gerrymandering and the Courts 213-214 (B. Grofman ed. 1990) (noting that gerrymandering can produce "high proportions of very safe seats"); Brief for Bernard Grofman et al. as Amici Curiae 5-8 (decline of competitive seats). Cf. Wells, supra, at 551 (Harlan, J., dissenting) ("A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues").

I would therefore preserve Davis's holding that political gerrymandering is a justiciable issue, but otherwise start anew. I would adopt a political gerrymandering test analogous to the summary judgment standard crafted in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), calling for a plaintiff to satisfy elements of a prima facie cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting the plaintiff's case, but to offer an affirmative justification for the districting choices, even assuming the proof of the plaintiff's allegations. My own judgment is that we would have better luck at devising a workable prima facie case if we concentrated as much as possible on suspect characteristics of individual districts instead of state-wide patterns. It is not that a statewide view of districting is somehow less important; the usual point of gerrymandering, after all, is to control the greatest number of seats overall. But, as will be seen, we would be able to call more readily on some existing law when we defined what is suspect at the district level, and for now I would conceive of a statewide challenge as itself a function of claims that individual districts are illegitimately drawn. Finally, in the same interest of threshold simplicity, I would stick to problems of single-member districts; if we could not devise a workable scheme for dealing with claims about these, we would have to forget the complications posed by multimember districts.

JUSTICE BREYER, dissenting.

The use of purely political considerations in drawing district boundaries is not a "necessary evil" that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political "gerrymandering" will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy. . . .

The plurality focuses directly on the most difficult issue before us. It says, "no test – yea, not even a five-part test – can possibly be successful unless one knows what he is testing for." Ante, at 28 (emphasis in original). That is true. Thus, I shall describe a set of circumstances in which the use of purely political districting criteria could conflict with constitutionally mandated democratic requirements – circumstances that the courts should "test for."

[T]he use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely the unjustified use of political factors to entrench a minority in power. By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By unjustified entrenchment
I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These "other" factors that could lead to "justified" (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.

Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored.

[The plurality makes one criticism that warrants a more elaborate response. It observes "that the mere fact that these four dissenters come up with three different standards – all of them different from the two proposed in Bandemer and the one proposed here by appellants – goes a long way to establishing that there is no constitutionally discernible standard." Ante, at 22-23.

Does it? The dissenting opinions recommend sets of standards that differ in certain respects. Members of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion. And that discussion could lead to change in the law, where, as here, one member of the majority, disagreeing with the plurality as to justiciability, remains in search of appropriate standards. [See Kennedy, J., concurring in judgment].

In League of United Latin American Citizens v. Perry, discussed at § 20.4 n.62, Justice Kennedy joined with Justices Stevens, Souter, Ginsburg and Breyer to hold that one district in a Texas redistricting plan adopted in 2003 did have an impermissible effect of discriminating against Hispanic voters, and thus violated § 2 of the Voting Rights Act. Dissenting from this conclusion, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, would have held that all the districts in the Texas redistricting plan were based upon political gerrymandering, and, as such, did not violate § 2’s concern with diluting minority voting strength. Chief Justice Roberts and Justice Alito indicated they took no position on whether political gerrymandering cases should always be viewed as political questions, as the 4-Justice plurality opinion had concluded in Vieth. Justices Scalia and Thomas held to their view in Vieth that such cases always are political questions. The Court had a chance to revisit this issue in Whitford v. Gill, 218 F. Supp. 3d 837 (2016) (2-1 decision by 3-judge district court) (Republican political gerrymandering in Wisconsin unconstitutional under test focusing on extent of “cracking,” dividing one party’s supporters so they fall short of being the majority in multiple districts, and “packing,” concentrating one party’s backers in a few districts they win by overwhelming majorities), cert. granted, 137 S. Ct. 2268 (2017) (judgment stayed pending review), but the case was remanded on standing grounds, as noted at § 3.3.5(E) n.52.

66 126 S. Ct. 2594, 2612-23 (2006); id. at 2652-53 (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 2663-69 (Scalia, J., joined by Thomas, J., and joined in Part III by Roberts, C.J., and Alito, J., concurring in the judgment in part and dissenting in part).
Nixon v. United States
506 U.S. 224 (1993)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the “Senate shall have the sole Power to try all Impeachments.” But before we reach the merits of such a claim, we must decide whether it is “justiciable,” that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides: “The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word “sole” indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.

Petitioner argues that the word “try” in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. From there petitioner goes on to argue that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses, as was done pursuant to Senate Rule XI. “‘Try’ means more than simply ‘vote on’ or ‘review’ or ‘judge.’ In 1787 and today, trying a case means hearing the evidence, not scanning a cold record.” Brief for Petitioner 25. Petitioner concludes . . . that courts may review whether or not the Senate “tried” him before convicting him.

There are several difficulties with this position which lead us ultimately to reject it. The word “try,” both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as “[t]o examine” or “[t]o examine as a judge.” See 2 S. Johnson, A Dictionary of the English Language (1785). In more modern usage the term has various meanings. For example, try can mean “to examine or investigate judicially,” “to conduct the trial of,” or “to put to the test by experiment, investigation, or trial.” Webster's Third New International Dictionary 2457 (1971). Petitioner submits that “try,” as contained in T. Sheridan, Dictionary of the English Language (1796), means “to examine as a judge; to bring before a judicial tribunal.” Based on the variety of definitions, however, we cannot say that the Framers used the word “try” as an implied limitation on the method by which the Senate might proceed . . . “As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require. . . .” Dillon v. Gloss, 256 U.S. 368, 376 (1921).
The conclusion that the use of the word “try” in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments: The Members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word “try” in the first sentence.

Petitioner devotes only two pages in his brief to negating the significance of the word “sole” in the first sentence of Clause 6. As noted above, that sentence provides that “[t]he Senate shall have the sole Power to try all Impeachments.” We think that the word “sole” is of considerable significance. Indeed, the word “sole” appears only one other time in the Constitution—with respect to the House of Representatives’ “sole Power of Impeachment.” Art. I, § 2, cl. 5 (emphasis added). The commonsense meaning of the word “sole” is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. “Sole” is defined as “having no companion,” “solitary,” “being the only one,” and “functioning . . . independently and without assistance or interference.” Webster's Third New International Dictionary 2168 (1971). If the courts may review the actions of the Senate in order to determine whether that body “tried” an impeached official, it is difficult to see how the Senate would be “functioning . . . independently and without assistance or interference.”

Nixon asserts that the word “sole” has no substantive meaning. To support this contention, he argues that the word is nothing more than a mere “cosmetic edit” added by the Committee of Style after the delegates had approved the substance of the Impeachment Trial Clause. There are two difficulties with this argument. First, accepting as we must the proposition that the Committee of Style had no authority from the Convention to alter the meaning of the Clause, see 2 Records of the Federal Convention of 1787, p. 553 (M. Farrand ed. 1966) (hereinafter Farrand), we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. See Powell v. McCormack, 395 U.S., at 538-539. That is, we must presume that the Committee did its job. This presumption is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of Style's linguistic version. See 2 Farrand 663-667. We agree with the Government that “the word ‘sole’ is entitled to no less weight than any other word of the text, because the Committee revision perfected what ‘had been agreed to.’” Brief for Respondents 25. Second, carrying Nixon's argument to its logical conclusion would constrain us to say that the second to last draft would govern in every instance where the Committee of Style added an arguably substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent.

Petitioner also contends that the word “sole” should not bear on the question of justiciability because Art. II, § 2, cl. 1, of the Constitution grants the President pardon authority “except in Cases of Impeachment.” He argues that such a limitation on the President's pardon power would not have been necessary if the Framers thought that the Senate alone had authority to deal with such
questions. But the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is “[a]n executive action that mitigates or sets aside punishment for a crime.” Black's Law Dictionary 1113 (6th ed. 1990) (emphasis added). Authority in the Senate to determine procedures for trying an impeached official, unreviewable by the courts, is therefore not at all inconsistent with authority in the President to grant a pardon to the convicted official. The exception from the President's pardon authority of cases of impeachment was a separate determination by the Framers that executive clemency should not be available in such cases.

Petitioner finally argues that even if significance be attributed to the word “sole” in the first sentence of the Clause, the authority granted is to the Senate, and this means that “the Senate – not the courts, not a lay jury, not a Senate Committee – shall try impeachments.” Brief for Petitioner 42. It would be possible to read the first sentence of the Clause this way, but it is not a natural reading. Petitioner's interpretation would bring into judicial purview not merely the sort of claim made by petitioner, but other similar claims based on the conclusion that the word “Senate” has imposed by implication limitations on procedures which the Senate might adopt. Such limitations would be inconsistent with the construction of the Clause as a whole, which, as we have noted, sets out three express limitations in separate sentences.

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. See 290 U.S. App. D.C., at 424, 938 F.2d at 243; R. Berger, Impeachment: The Constitutional Problems 116 (1973). This silence is quite meaningful in light of the several explicit references to the availability of judicial review as a check on the Legislature's power with respect to bills of attainder, ex post facto laws, and statutes. See The Federalist No. 78, p. 524 (J. Cooke ed. 1961) (“Limitations ... can be preserved in practice no other way than through the medium of the courts of justice”).

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the “important constitutional check” placed on the Judiciary by the Framers. See id., No. 81, at 545. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. Nixon fears that if the Senate is given unreviewable authority to interpret the Impeachment Trial Clause, there is a grave risk that the Senate will usurp judicial power. The Framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. Id., No. 66, at 446. This split of authority “avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches.” The second safeguard is the two-thirds supermajority vote requirement. Hamilton explained that “[a]s the concurrence of two-thirds of the senate will be
requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.” Ibid.

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See Baker v. Carr, 369 U.S., at 210. We agree with the Court of Appeals 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.” 290 U.S. App. D.C., at 427, 938 F.2d, at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Justice STEVENS, concurring.

For me, the debate about the strength of the inferences to be drawn from the use of the words “sole” and “try” is far less significant than the central fact that the Framers decided to assign the impeachment power to the Legislative Branch. The disposition of the impeachment of Samuel Chase in 1805 demonstrated that the Senate is fully conscious of the profound importance of that assignment, and nothing in the subsequent history of the Senate's exercise of this extraordinary power suggests otherwise. See generally 3 A. Beveridge, The Life of John Marshall 169-222 (1919); W. Rehnquist, Grand Inquests 275-278 (1992). Respect for a coordinate branch of the Government forecloses any assumption that improbable hypotheticals like those mentioned by Justice White and Justice Souter will ever occur. Accordingly, the wise policy of judicial restraint, coupled with the potential anomalies associated with a contrary view, provide a sufficient justification for my agreement with the views of the Chief Justice.

Justice WHITE, with whom Justice BLACKMUN joins, concurring in the judgment.

Petitioner contends that the method by which the Senate convicted him on two articles of impeachment violates Art. I, § 3, cl. 6, of the Constitution, which mandates that the Senate “try” impeachments. The Court is of the view that the Constitution forbids us even to consider his contention. I find no such prohibition and would therefore reach the merits of the claim. I concur in the judgment because the Senate fulfilled its constitutional obligation to “try” petitioner.

It should be said at the outset that, as a practical matter, it will likely make little difference whether the Court's or my view controls this case. This is so because the Senate has very wide discretion in specifying impeachment trial procedures and because it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. Even taking a wholly practical approach, I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to “try” impeachment cases. When
asked at oral argument whether that direction would be satisfied if, after a House vote to impeach, the Senate, without any procedure whatsoever, unanimously found the accused guilty of being “a bad guy,” counsel for the United States answered that the Government's theory “leads me to answer that question yes.” Tr. of Oral Arg. 51. Especially in light of this advice from the Solicitor General, I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process.

The fact that Art. III, § 2, cl. 3, specifically exempts impeachment trials from the jury requirement provides some evidence that the Framers were anxious not to have additional specific procedural requirements read into the term “try.” Contemporaneous commentary further supports this view. Hamilton, for example, stressed that a trial by so large a body as the Senate (which at the time promised to boast 26 members) necessitated that the proceedings not “be tied down to . . . strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges. . . .” The Federalist No. 65, p. 441 (J. Cooke ed. 1961).

It is also noteworthy that the delegation of factfinding by judicial and quasi-judicial bodies was hardly unknown to the Framers. Jefferson, at least, was aware that the House of Lords sometimes delegated factfinding in impeachment trials to committees and recommended use of the same to the Senate. T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States § LIII (2d ed. 1812) (“The practice is to swear the witnesses in open House, and then examine them there: or a committee may be named, who shall examine them in committee . . .”), reprinted in Jefferson's Parliamentary Writings, The Papers of Thomas Jefferson, Second Series 424 (W. Howell ed. 1988).

In short, textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say that the Senate's use of a factfinding committee under Rule XI is entirely compatible with the Constitution's command that the Senate “try all impeachments.” Petitioner's challenge to his conviction must therefore fail.

Justice SOUTER, concurring in the judgment.

Whatever considerations feature most prominently in a particular case, the political question doctrine is “essentially a function of the separation of powers,” existing to restrain courts “from inappropriate interference in the business of the other branches of Government,” United States v. Munoz-Flores, 495 U.S. 385, 394 (1990), and deriving in large part from prudential concerns about the respect we owe the political departments, see Goldwater v. Carter, 444 U.S. 996, 1000 (1979) (Powell, J., concurring in judgment); A. Bickel, The Least Dangerous Branch 125-126 (2d ed. 1986); Finkelstein, Judicial Self-Limitation, 37 Harv.L.Rev. 338, 344-345 (1924). Not all interference is inappropriate or disrespectful, however, and application of the doctrine ultimately turns, as Learned Hand put it, on “how importunately the occasion demands an answer.” L. Hand, The Bill of Rights 15 (1958).
This occasion does not demand an answer. The Impeachment Trial Clause commits to the Senate “the sole Power to try all Impeachments,” subject to three procedural requirements: the Senate shall be on oath or affirmation; the Chief Justice shall preside when the President is tried; and conviction shall be upon the concurrence of two-thirds of the Members present. U.S. Const., Art. I, § 3, cl. 6. It seems fair to conclude that the Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to “try” impeachments. Other significant considerations confirm a conclusion that this case presents a nonjusticiable political question: the “unusual need for unquestioning adherence to a political decision already made,” as well as “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” Baker, supra, 369 U.S., at 217. As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government.

One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply “a bad guy,” (White, J., concurring in judgment), judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. “The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.” Baker, supra, at 215.

§ 4.4 Abstention

For reasons of "comity" and respect for state courts reflected in the dual theory of sovereignty, often-termed “Our Federalism,” as well as a reluctance to grant an equitable remedy where there is an adequate legal remedy, the Court held in Younger v. Harris that federal courts should not enjoin pending state criminal prosecutions where the defendant seeks to invalidate on its face the law under which the action was brought. The Court said that at least where the state has not brought the action in bad faith, the burden of continued defense is not ordinarily "irreparable injury." In Hicks v. Miranda, this principle was extended to a criminal case where the state proceeding was brought after the federal case had been filed, but before the federal court had reached the merits of the case.

The Younger abstention doctrine was extended to civil cases in Trainor v. Hernandez. That case involved the important state interests of the constitutionality of a state attachment proceeding used by the state to recover welfare payments allegedly wrongfully paid. In Middlesex County Ethics
Commission v. Garden State Bar Association, a case involving a state bar disciplinary hearing, the Court phrased the relevant questions for purposes of Younger abstention as whether: (1) there is an ongoing state judicial proceeding; (2) do the proceedings implicate important state interests; and (3) is there an adequate opportunity in the state proceedings to raise constitutional challenges.

In Pennzoil Co. v. Texaco, Inc., the Supreme Court went further to hold that even where the state is not a party a federal court should not enjoin a pending state civil proceeding if important state interests call for "comity." Reversing the Second Circuit Court of Appeals, which had enjoined Pennzoil from executing on a $12 billion judgment of a Texas trial court for tortious interference with a contract, the Supreme Court said that Texas had an interest in enforcing its own orders and judgments, and plaintiffs were unable to show that state procedural law barred presentation of its federal claims. Justice Brennan, concurring, urged the Court not to abstain in civil cases, especially § 1983 actions, saying that Texas had only a small interest in such litigation.

A second kind of abstention is Pullman abstention. The Court held in Railroad Commission of Texas v. Pullman Co. that federal courts should abstain from granting an equitable injunction if unresolved federal issues depend on the meaning of unclear state law, considering the degree of uncertainty and the delay and expense that will result from an injunction, and to avoid an unnecessary decision of constitutional questions. Justice Blackmun indicated in Pennzoil that he thought that case was appropriate for Pullman abstention, as did Justice Marshall, who noted the federal action was essentially an appeal from a state court judgment with a constitutional claim intertwined with the merits. Of course, if the meaning of a state statute is clear, or the state law is otherwise settled by state court precedents, or the injunction would be proper to grant under any possible interpretation of the state statute, then Pullman abstention does not apply.

Pullman abstention was extended in Louisiana Power & Light Co. v. City of Thibodaux to involve abstention in a state eminent domain proceeding, which though not formally an equitable


71 481 U.S. 1, 10-17 (1987); id. at 19 (Brennan, J., concurring). On Younger abstention in civil cases, see also Gilbertson v. Albright, 381 F.3d 965, 968 (9th Cir. 2004) (en banc opinion) (Younger principles apply in civil cases to actions at law for damages, because a determination that the party’s rights have been violated would have the same effect as a declaration or injunction on pending state proceedings. However, federal courts should not dismiss actions where damages are at issue; rather, damages actions should be stayed until the state proceedings are completed).

72 Pullman, 312 U.S. 496, 501-02 (1941); Pennzoil, 481 U.S. at 29 (Blackmun, J., concurring in the judgment); id. at 23 (Marshall, J., concurring in the judgment).


proceeding, raised the same issue of respect for “comity” and “state sovereignty.” Professors Nowak and Rotunda have noted that it is “more precise to speak of Pullman deferral, to emphasize that Pullman recognizes that federal courts should not prematurely resolve the constitutionality of a state statute,” but that “the term ‘abstention’ is used too often that it is fruitless to insist on a change.”

A third kind of abstention, Burford abstention, applies when on-going state administrative action or state court litigation would help resolve difficult questions of state law and state needs for uniformity caution against federal resolution of the case. The Court noted that in Burford v. Sun Oil Co. that this kind of abstention should be rare, and only applies where the relief sought is equitable. Under Burford, a federal court has no right to stay or dismiss, or remand to state court, a damage action properly brought in federal court.

A fourth kind of abstention is the Rooker-Feldman doctrine. Based on Rooker v. Fidelity Trust Co. and District of Columbia Court of Appeals v. Feldman, the Rooker-Feldman doctrine bars a losing party in a state court from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violated the loser’s federal rights. As phrased, the doctrine naturally does not apply to a federal suit brought by a non-party to the state suit. As applied by some lower federal courts to bar district court review even when the issue “had not been raised in state court, but could have been,” the doctrine has been criticized as limiting federal jurisdiction even for federal question cases merely because litigation on “inextricably intertwined” issues was begun first in a state court.

In Exxon Mobil Corp. v. Saudi Basic Industries Corp., the Court limited the Rooker-Feldman doctrine to its core facts. The case involved a situation in which Saudi Basic Industries (SBI) had filed an action against Exxon in a state court and Exxon had then filed an action in federal court for damages against SBI, not in an attempt to overturn any judgment entered by state court, but to
protect itself in the event it lost in the state court on grounds, such as the state statute of limitations, which would not preclude relief in the federal venue. The state court in fact entered a substantial judgment for Exxon. Before the state court trial, SBI moved the federal court to dismiss Exxon’s action. The Third Circuit dismissed on Rooker-Feldman grounds, but the Supreme Court held in a unanimous opinion that properly invoked federal jurisdiction does not vanish merely because a state court reaches judgment on the same or a related question while the case remains under consideration in a federal court. Exxon was not attempting to overturn any state court judgment.

Of course, as the Court noted in Saudi Basic Industries, disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. As the Court noted, “The Full Faith and Credit Act, 28 U.S.C. § 1738, originally enacted in 1790, ch. 11, 1 Stat. 122, requires the federal court to ‘give the same preclusive effect to a state-court judgment as another court of that State would give.’ . . . . In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.”

Because of the Full Faith and Credit Act, parties may not relitigate in federal court an issue that has previously been resolved by state courts of competent jurisdiction. For example, in San Remo Hotel, L.P. v. City and County of San Francisco a party sought to litigate a federal claim under the Takings Clause that was not ripe until the entry of a final state judgment denied just compensation. The federal court applied Pullman abstention, saying the claim was not ripe until the government entity charged with implementing the state regulations had reached a final decision regarding the application of the regulations to the property at issue, as held in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County.

Back in the state court, the plaintiffs argued the takings issue in their mandamus suit, and lost. They then returned to federal court, saying their case was now ripe. Justice Stevens wrote for a majority that interests in finality trumped the interest in giving a losing litigant access to an additional tribunal, particularly since they were not required to litigate the takings issue fully in the state court. Chief Justice Rehnquist, with Justices O’Connor, Kennedy, and Thomas, concurred in the judgment but expressed the opinion that Williamson County should be reconsidered because the Court should rethink whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts. The Chief Justice noted the Williamson County rule had the practical effect that litigants who go to state court to seek compensation will likely be unable later to assert their takings claims in federal court.

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82 Id. at 293, citing Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523 (1986).
84 Id. at 342-48.
85 Id. at 348-52 (Rehnquist, C.J., joined by O’Connor, Kennedy & Thomas, JJ., concurring).
PART II: THE LEGISLATIVE POWER

CHAPTER 5: OVERVIEW OF FEDERAL LEGISLATIVE POWER

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§ 5.1 Introduction to Federal Legislative Power

The Preamble to the Constitution announced the broad purposes for which the Constitution was framed. It states: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

In his 1953 treatise, POLITICS AND THE CONSTITUTION, Professor Crosskey argued that since the Preamble covers virtually all the subjects for which a government might regulate, the Constitution must have been intended to create plenary power in the federal government, subject to limitations on power indicated by clear constitutional text. In his 1833 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Justice Story discussed more limited inferences to be drawn from the Preamble, stating that the Preamble’s “true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them.” Justice Story then indicated, consistent with a natural law focus on interpreting provisions in light of their “purpose” and “mischiefs to be remedied,” how each of the various clauses of the Preamble were


2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (1833).

3 The classic formulation of natural law interpretation in light of the “mischief to be remedied” occurred in Heydon's Case, 76 Eng. Rptr. 637, 638 (1584), where Lord Coke said that a judge should inquire into the "mischief and defect" that the drafter was seeking to remedy and "the true reason for the remedy," and the judge should "make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief . . . and to add force to the cure and remedy, according to the true intent of makers of the act."
related to various mischiefs which had arisen under the Articles of Confederation that needed to be remedied. 4

Perhaps the most important single section of the Constitution is Article I, § 8, the enumeration of congressional powers. It begins with the phrase, "The Congress shall have Power," and then continues in clauses 1-17 to list powers, concluding in clause 18 with the Necessary and Proper Clause. That clause provides Congress has the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The greatest constitutional struggles in the first 150 years of our Nation, apart from the related question of secession, were fought over the meaning of three of the provisions in Article I, § 8: clause 1, the General Welfare Clause; clause 3, the Commerce Clause; and clause 18, the Necessary and Proper Clause. As indicated at § 1.2 n.23, early American politics was driven by: (1) economic policy, particularly regarding tariffs and the protection of manufacturing from foreign competition; (2) slavery and the racial problems that developed in the aftermath of slavery; and (3) the role of the federal government, as opposed to state governments, in promoting economic activity generally.

Clause 1 of Article I, § 8, which includes the General Welfare Clause, provides: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States, but all Duties, Imposts and Excises shall be uniform throughout the United States.” There are at least three ways that one could read this Clause:

1. The narrowest view, espoused originally by Thomas Jefferson and James Madison, was that it granted a power to tax and spend only with respect to the specifically enumerated legislative powers listed in the remaining 17 clauses of § 8. 5

2. Alexander Hamilton wrote that it granted a power to levy taxes generally, and an independent power to pay the debts and provide for the common defense and general welfare – in short, a general spending power. Justice Story agreed with this view in his 1833 work, Commentaries on the Constitution of the United States. 6

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4 Id. §§ 462-68 (discussing inferences from “we the people,” not “we the states”; id. §§ 469-81 (“more perfect union”); id. §§ 482-89 (“establish justice”); id. §§ 490-93 (“ensure domestic tranquility”); id. §§ 495-96 (“provide for the common defence”); id. §§ 497-506 (“promote the general welfare”); id. §§ 507-16 (“secure the blessing of liberty”). On the preamble generally, see Milton Handler, Brian Leiter & Carole E. Handler, A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation, 12 Cardozo L. Rev. 117 (1990).

5 See generally CROSSKEY, supra note 1, at 404-07.

6 Id. at 401-03, discussing, inter alia, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 984-88 (1833).
(3) The broadest interpretation of this Clause is that it grants plenary power to Congress to legislate on any matter, through regulation or by spending, as part of a plenary power to levy taxes, pay debts, and provide for the common defense and general welfare of the United States.8

In his treatise, POLITICS AND THE CONSTITUTION, Professor Crosskey concluded that the correct view was the third, or broadest, view. Responding to the argument that under this view the rest of the enumeration of powers in Article I, § 8 would be superfluous, he said that the primary purpose of the rest of § 8 was not to give the federal government power, but to allocate power and insure that a number of powers which historically, and according to Blackstone, belonged to the executive branch in England, the King, were transferred to the legislative branch.8

This broader view has never been adopted by the Supreme Court. Instead, in cases like United States v. Butler, Stewart Machine Co. v. Davis, and Helvering v. Davis,9 the Supreme Court has adopted the second view of Hamilton and Story that the General Welfare Clause is a general grant of power to tax and spend, but that congressional power to regulate must be found in one of the remaining clauses of Article I, § 8. Some commentators have argued based on text, context, and history for the first, narrower view of Jefferson and Madison.10

The Commerce Clause, Article I, § 8, cl. 3, provides that Congress has the power “to regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes.” The main points of contention in interpreting the Commerce Clause have been: (1) what constitutes “commerce”; and (2) how to interpret the phrase “among the several States.” Regarding the first

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7 Id. at 391-94.
8 Id. at 391-94, 411-41 (discussing among congressional powers listed in Art. I, § 8 that would have raised a concern with the King’s prerogatives in England: those powers carried over from the Articles of Confederation, the power to coin money, cl.5; to punish piracies and felonies committed on the high seas, cl. 10; and to declare war and grant letters of marque and reprisal, cl. 11; and, among new powers for Congress, to provide copyright-patent protection, cl. 8; to create lower federal courts, cl. 9; to punish for violations of the Law of Nations, cl. 10; to raise and support the military, and provide for their regulation, training, and discipline, cls. 12-16; and to exercise exclusive legislation over the Nation’s capitol, cl. 17).
9 See United States v. Butler, 297 U.S. 1, 65-68 (1936) (the General Welfare Clause provides for general taxing and spending power, consistent with Hamilton’s and Story’s views, but the Clause does not given Congress the power to regulate); Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 581-83 (1937) (social security tax on employers and unemployment compensation scheme constitutional under the General Welfare Clause); Helvering v. Davis, 301 U.S. 619, 640-46 (1937) (social security pension scheme constitutional under the General Welfare Clause).
issue, the question involves whether “commerce” has a limited meaning, restricted mostly to buying and selling, and thus not covering activities such as manufacturing, mining, or agriculture, or does “commerce” have a broader meaning, encompassing all forms of economic commercial activity. Regarding the second issue, the question involves whether “among” means “between,” so that only interstate commerce can be regulated by Congress, or does “among” include commerce carried on within a state, interpreting "States" in a collective fashion, so that any commerce carried on within the United States is commerce “among” the States.

The Court has settled on the broader meaning of “commerce” to include all forms of economic activity, but on the more limited interpretation of “among” meaning "between." However, the Court has held consistently since 1937 that congressional power under the Commerce Clause extends to any subject which, in the aggregate, “substantially affects” interstate commerce between the states.11

Notes on the Constitutional Convention do not authoritatively resolve the scope of the General Welfare Clause or the Commerce Clause. However, they do suggest that the drafters intended for the federal government to have considerable power. The backdrop to the Constitutional Convention was the view that the Articles of Confederation, which had been adopted in 1781, did not give the federal government sufficient power. Although both the Articles of Confederation and the Constitution represented federal systems of government broadly consistent with a “confederate republic” model of government, under the Articles there was no federal power to tax, no federal executive branch, no federal judiciary, and no federal power to prevent protectionist legislation passed by various states after the end of the Revolutionary War in 1783, when a deep recession in 1784-85, caused in part by England closing markets and limiting importation of American goods into England in retaliation for losing the Revolutionary War, prompted state protectionism in response. Such protectionist legislation, passed by states to protect their own state’s commerce from competition, had the effect of retarding economic growth in the United States generally.12

Faced with this reality, a meeting in Annapolis, Maryland was called and held in the summer of 1786, particularly to focus on the need to amend the Articles to deal with this economic problem and provide for “uniform rules regarding trade.” Although only 5 States sent delegates – New York, New Jersey, Pennsylvania, Delaware, and Virginia – the problems raised at that meeting convinced the participants, including James Madison and Alexander Hamilton, to petition the states for a broader Constitutional Convention the following year. This led to the Constitutional Convention in 1787 in Philadelphia, which framed the current United States Constitution.13


On May 29, 1787, Mr. Randolph opened the Convention by noting a number of defects in the existing Articles of Confederation: there was no security against foreign invasion, there were quarrels between the states, a need for commercial regulations, and a need to make the federal government paramount over state constitutions.\textsuperscript{14}

An early proposal, on May 31, was that the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases to which the separate states are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation. The "incompetent" clause was objected to as too vague and taking too much from the states. Madison favored an enumeration, but wanted to insure a government that would provide for the safety, liberty, and happiness of the community. Despite this objection, the delegates approved the May 31 proposition 9-0-1.\textsuperscript{15}

On July 17, a substitute was introduced by Mr. Sherman to give Congress the power to legislate in all cases which may concern the common interests of the Union, but not to interfere with matters of the internal police of the states. Clearly this was an attempt to narrow the power of Congress. Gouvernor Morris, who was the floor leader for the Northern States, opposed the motion, saying that the internal police ought to be infringed in many cases. Sherman's motion lost by 8 to 2. The framers then approved a motion, seconded by Morris, to add a clause on legislating for the general interests of the union. As amended, the proposition gave Congress power to make laws binding on the people of the United States in all cases which may concern the common interests of the Union and, moreover, to legislate in all cases for the general interests of the Union and also in those to which the states are separately incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation. This passed 8 to 2.\textsuperscript{16}

A Committee of Detail was appointed on July 24 to report a Constitution conformable to Resolutions passed by the Convention. On August 6, the Committee on Detail reported its work as "conformable to the Resolutions passed by the Convention."\textsuperscript{17} Thus, there was no indication in its report that the enumeration was intended to limit the power of Congress in ways not authorized by the initial set of resolutions.

The report looks like the Constitution which ultimately passed, except there was no General Welfare Clause. A debate developed in which Northerners expressed their opposition to the slave trade and Southerners were concerned that the commerce power might be used to interfere with slavery. In order to avoid having the whole convention break down on this issue, a special committee of 11 was

\begin{footnotes}
\item[14]\textit{I Farrand, Records of the Federal Convention of 1787}, at 18-19 (1911).
\item[15]\textit{Id.} at 53.
\item[16]\textit{II Farrand, Records of the Federal Convention of 1787}, at 21, 25-27 (1911).
\item[17]\textit{Id.} at 181-82.
\end{footnotes}
appointed on August 22. On August 24, the Committee, avoiding use of the word “slaves,” recommended that the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1800. On August 25, that language was amended so the bar extended to 1808. Southerners appear to have thought that by then they would have a majority in the House and thus could protect slavery from federal action.

On September 4, the same committee of 11, to whom a number of policy resolutions had been referred, recommended that the clause empowering Congress to levy taxes be amended by adding the Common Defense and General Welfare Clause. This was approved, apparently without debate. Also, "and with the Indian tribes" was added to the Commerce Clause.19

On September 12, the Committee of Style reported a full draft of the proposed Constitution, according to the above decisions. Then, on September 14, the clause "but all such Duties, Imposts and Excises shall be uniform throughout the United States," was unanimously added after the General Welfare Clause.21 The fact that the Uniformity Clause limitation on the taxing power was added at the last minute, independent of the General Welfare Clause, lends some credence to Alexander Hamilton's theory, adopted by Supreme Court majorities, that the General Welfare Clause was intended by the framers to be an independent substantive grant of legislative power, rather than included as part of limiting the taxing power, as is the Uniformity Clause. In contrast, Jefferson and Madison had argued that the "general welfare" language was merely part of limiting the taxing power to being able to tax only “in order” to pay debts and provide for the common defense and general welfare of the United States, general welfare being defined by the enumerated legislative powers listed in the remaining 17 clauses of § 8.

The fact that the South did not have a majority in the House of Representatives by 1808 led to a long battle by Southern interests to limit the commerce power of Congress. This battle was resisted by Chief Justice Marshall and the Marshall Court in terms of constitutional doctrine, but Southerners were remarkably successful for a long time in terms of actual legislative action. While during the formalist era (1873-1937), the Supreme Court adopted doctrines significantly limiting the power of Congress or states to regulate commercial activity as part of a Republican pro-business majority on the Supreme Court, under modern Supreme Court doctrine Congress and states can legislate in economic matters in almost all cases for the general interests of the Nation.

18 Id. at 374.
19 Id. at 497.
20 Id. at 585, 590 et. seq.
21 Id. at 614.
§ 5.2 Political and Legal Background for McCulloch v. Maryland

In 1791, a debate arose involving the constitutionality of Congress creating a national bank. President Washington’s Secretary of State, Thomas Jefferson, counseled Washington that incorporating a bank was not authorized by any specific language in the Constitution. As a strong proponent of states’ rights, Jefferson also believed a national bank was not a good idea in practice. President Washington’s Secretary of the Treasury, Alexander Hamilton, counseled Washington on why the bank bill was constitutional and prudent. Among other members of Washington’s Cabinet, Washington’s Attorney General, Edmund Randolph, sided with Jefferson on the constitutional issue, although Randolph did not join Jefferson in criticizing the bank on policy grounds.22 Congress, in passing the bill, and Washington, in signing it, sided with Hamilton, creating the First National Bank of the United States, with a 20-year charter, from 1791-1811.

When that charter ran out, Congress did not re-authorize the bank. As a competitor to existing state banks of the time, the National Bank was not favored by states’ rights advocates. The difficulties generated by not having a national bank during the War of 1812, however, in terms of not having a central repository for tax receipts, nor a central location from which army and navy personnel could be paid, persuaded the Congress, and President Madison, to authorize a Second National Bank of the United States in 1816, pursuant to a new 20-year charter, from 1816-1836. Congress, in fact, had been persuaded of the need for a bank by 1814, but Madison vetoed the bank bill at that time, although not on constitutional grounds, but on grounds of public policy that the bill did not address reviving the public credit or aiding the treasury in collecting taxes.23

Following chartering of the Second National Bank in 1816, Maryland imposed a tax on notes issued by any branch of the bank located in Maryland. When the cashier of the Baltimore branch refused to pay the tax, Maryland brought suit to recover a forfeit for issuing notes on unstamped paper. The trial court awarded judgment for plaintiff and the Maryland Court of Appeals affirmed. Thus, there was a clash between state interests and those of the United States. Specifically, the issues were whether Congress had the power to create such a bank, and the right of the Maryland to tax it.24 Marshall's opinion in 1819 in McCulloch v. Maryland, sustaining federal power to incorporate a bank, and protecting it from state taxation, has had more long-lasting influence than any other decision in constitutional law except, perhaps, Marbury v. Madison. Regarding the bank itself, in 1836, President Jackson vetoed an attempt to reauthorize the Second National Bank. There was no centralized money or banking system until the National Banking Act of 1863 began the process of

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replacing state bank notes and gold and silver coinage in circulation with the federal dollar (gold, silver, or paper greenbacks) as the currency of the United States. The Federal Reserve Act of 1913 created the Federal Reserve System, which remains the banking system of the United States today.\textsuperscript{25}

The most fruitful way to consider \textit{McCulloch} is to focus on the process of reasoning that Chief Justice Marshall used to consider the problem. Among the possible sources of text, context, history, practice, and precedent, Chief Justice Marshall first discussed the arguments of practice and precedent, viewing them as the strongest arguments to uphold the constitutionality of the Bank. Regarding arguments of legislative and executive practice, Marshall noted, “It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the Nation respecting it. The principle now contested was introduced at a very early period of our history, [and] has been recognized by many successive legislatures.” Indeed, Marshall noted, “The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast [Ed.: that is, President Washington], it became a law.” Regarding arguments of precedent, Marshall noted that the principle that the Bank is a constitutionally valid institution “has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.”\textsuperscript{26}

These arguments of practice and precedent had convinced at least one prominent figure, James Madison, that such a bank was constitutional. As President, Madison had signed the legislation creating the Second National Bank in 1816, despite the fact that Madison had opposed the First National Bank in 1791 as unconstitutional, agreeing then with Jefferson’s arguments on the lack of any specific textual support in Article I, § 8 for incorporating a bank. In his signing letter for the bill, which explained why he thought the bill was constitutional in 1816, Madison noted this was based upon "repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."\textsuperscript{27}

Alternatively, it could be argued that Madison’s change of heart regarding the bank’s constitutionality was based only on Madison changing his view on the “necessity” of the national bank, given his experience during the War of 1812, and thus Madison’s change was consistent with a fixed, \textit{static} view of constitutional interpretation merely interpreting in light of new knowledge


\textsuperscript{26} 17 U.S. (4 Wheat) 316, 401-02 (1819).

\textsuperscript{27} Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, \textit{Processes of Constitutional Decisionmaking} 17 (4th ed. 2000), quoting Madison’s signing letter to Congress.
what is “necessary” under the “Necessary and Proper Clause.” However, that is not the reason Madison gave in his letter signing the bank bill, which, as noted above, focused on later legislative, executive, judicial, and social practice. Nor is it consistent with Madison’s support throughout his life that such later action (“usus”) can fix the meaning of the Constitution. James Madison “consistently thought that ‘usus,’ the exposition of the Constitution provided by actual governmental practice and judicial precedents, could ‘settle the meaning and the intention of the authors.’”28 Indeed, Madison noted about constitutional interpretation, “[T]he early, deliberate, and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies” is relevant in determining constitutional meaning.29

Regarding arguments of text, context, and history, Chief Justice John Marshall began by looking to arguments of purpose, related provisions, and general history. He reasoned that the people had created a government of limited and enumerated powers, but supreme in its sphere of action. Marshall noted the Constitution was not drafted by the framers as a detailed Code. Marshall stated, “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”30

In addition, Marshall compared the related provision in the Articles of Confederation, which excluded implied powers by stating that the powers had to be “expressly delegated” to the Continental Congress, with the 10th Amendment, which states only that powers have to be “delegated” to the federal government, and does not require that they be “expressly delegated.” Indeed, the drafters of the 10th Amendment specifically rejected adding the words “express” to the 10th Amendment.31 Based on the comparison of the enacted text of the two documents, Marshall concluded that the Constitution does not exclude incidental or implied powers. In particular, Marshall noted that the means for executing the “great powers,” which he referred to as “ample powers on the due execution of which the happiness and prosperity of the nation so vitally depends,” were not enumerated in the Constitution, but were intended to be ample for executing the federal


30 17 U.S. at 407.

31 See Peter A. Lauricella, The Real “Contract with America”: The Original Intent of the Tenth Amendment and the Commerce Clause, 60 Albany L. Rev. 1377, 1391-92 (1997).
government’s powers, including the powers to levy taxes, borrow money, regulate commerce, declare and conduct war, and raise armies and navies.\textsuperscript{32}

Regarding what means could be implied to advance such governmental powers, Marshall stated that the Necessary and Proper Clause gives Congress the power to adopt means conducive to legitimate ends because "necessary" often imports "useful," not “absolute necessity,” as argued by Maryland, and the Constitution, meant to endure for ages and not to be a legal code, was intended to be adapted to various crises. Again, Marshall resorted to arguments of related provisions. The framers had used the phrase “absolutely necessary” in Article I, § 10, cl. 2 of the Constitution regarding preventing states from imposing duties on imports or exports, “except what may be absolutely necessary for executing its inspection Laws,” but did not use a similar phrase in Article I, § 8, cl. 18. Furthermore, as a structural matter, the Necessary and Proper Clause is placed among the grants of legislative power in Article I, § 8, and not among limitations upon those powers listed in Article I, § 9. Therefore, Marshall concluded, consistent with the natural law focus on both literal text (letter) and purpose (spirit), “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”\textsuperscript{33}

Marshall continued his opinion in \textit{McCulloch} by saying that all questions about the degree of necessity for choosing a means are for the legislature. It is sufficient that the law be “appropriate,” or “plainly adapted to that end,” and Marshall concluded that “none can deny it [the bank] being an appropriate measure” to aid in the collection and expenditure of revenue to facilitate the execution of various great objects of government.\textsuperscript{34}

\section{The Leading Case on Legislative Power: \textit{McCulloch} v. Maryland}

\textit{McCulloch v. Maryland}

17 U.S. 316 (1819)

Chief Justice MARSHALL delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its

\textsuperscript{32} 17 U.S. at 406-09.

\textsuperscript{33} \textit{Id.} at 409-21.

\textsuperscript{34} \textit{Id.} at 423.
decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.
It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "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." This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

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. But the question respecting the
extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.
Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.
The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "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 thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.
But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the Convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary," is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense – in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word
"absolutely." This word, then, like others, in used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

. . . . This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

The argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the Convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of suing language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c. "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a
sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire —

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded – if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible
with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the State of Maryland, is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.
But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction 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 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.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This approach to the Necessary and Proper Clause naturally gives Congress great latitude in terms of determining appropriate legislative means. Not for nothing was this clause called “the Sweeping Clause” by both proponents and opponents of the Constitution at the time of ratification. Under its terms, much legislation can be “swept” under the umbrella of its protective cover, and thus be made constitutional, although the requirement that the legislation be “necessary” and “proper” does impose a requirement that the legislation advance legitimate government objects.  

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This conclusion that the Necessary and Proper Clause should be interpreted to give Congress great discretion in deciding upon “appropriate” means to advance “proper” governmental ends has not gone unchallenged. Consistent with Jefferson’s analysis of the Necessary and Proper Clause, Maryland argued in *McCulloch* that “necessary” meant “absolutely necessary.”36 While not adopting such an extreme view, James Madison indicated that “necessary” must mean more than merely “useful” or “appropriate,” or else the clause would expand Congress’ powers too greatly.37 Indeed, even though Madison supported the constitutionality of a national bank in 1816, Madison criticized this aspect of Marshall’s opinion after *McCulloch* was decided.38

In part of the *McCulloch* opinion not excerpted above, Marshall did note that “should Congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.”39 Although it could be argued that this “pretext” language imposes an additional obligation on the Court to consider legislative motives in determining the constitutionality of ordinary legislation, the view of Court precedents has been, and the view of Marshall in private letters was, that this language merely requires Congress to advance legitimate interests, not illegitimate interests outside the scope of constitutionally delegated powers. So viewed, the “pretext” language adds nothing to the modern phrasing of the *McCulloch* doctrine as requiring statutes to be “rationally related to legitimate government interests.”40

Later commentators focusing on arguments of text, context, and history have also suggested that the Necessary and Proper Clause should have a more limited meaning than that given to it by Marshall in *McCulloch v. Maryland*. For example, Professor Randy Barnett has indicated that while the failure to use the phrase “indispensably necessary” or “absolutely necessary” in the Necessary and Proper Clause does suggest that the State of Maryland’s argument is weak, since had the framers and ratifiers wanted that meaning they were familiar with such a phrase, and would have used it in the Clause, the intent of the framers would have been to have more vigorous scrutiny of the necessity of certain means than Marshall’s mere use of the term “appropriate.”41

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36 17 U.S. at 413-15.


38 See id. at 201-02.

39 *Id.*, quoting *McCulloch*, 17 U.S. at 423.


41 Barnett, *supra* note 37, at 203-08.
There are two main problems with such an approach. The first problem would be to determine how much “need” is required to satisfy this more vigorous “necessary” requirement. No judicially manageable standards have ever been proposed that clearly resolve this issue. Thus, Marshall’s conclusion that the “degree” of the need is substantially within the political discretion of Congress, subject only to an “appropriateness” limitation, or as phrased in contemporary doctrine, “rational related to a legitimate government interest,” is consistent with a concern regarding a “lack of judicially manageable standards” in the political questions doctrine, as noted in *Baker v. Carr*, excerpted at § 4.3.2. Second, the phrase “necessary and proper” was often used in 18th-century agency and trust documents to give the agent or trustee great discretion to determine means to carry out legitimate ends of the grantor, consistent also with Marshall’s approach toward the term.42

While Madison criticized this aspect of *McCulloch* soon after its decision, as noted above, consistent judicial precedents following *McCulloch*, as well as the legislative and executive practice after *McCulloch* consistent with Marshall’s view of congressional power to determine appropriate means, would mean that Marshall’s views would be viewed today even by Madison as the controlling doctrine under a natural law theory of interpretation, despite whatever historical evidence might be noted to support Madison’s views of 200 years ago. Similarly, the more extreme pro-federal government views of Professor Crosskey, noted at § 5.1 nn. 1, 7-8, which give Congress virtually unlimited power to legislate on any matter, would be rejected today under a natural law theory of interpretation, despite one’s views on the historical evidence that could be used to support that view.

Marshall made no reference in his opinion to the deliberations of the Convention regarding the power of Congress to incorporate a national bank. That history would have shown that Congress rejected a general power of incorporation. The Convention also rejected a more limited proposal to give Congress the power to incorporate companies for the building of canals.43 Without such a general incorporation power, most corporations are creatures of state laws, not federal laws.

However, this history is not conclusive on the narrow question of congressional power to incorporate a bank as an institution “necessary and proper” to advance the other enumerated powers in Article I, § 8. This history on incorporation only conclusively establishes the view that a general power to incorporate, independent of a Necessary and Proper Clause analysis, lies with states, not the federal government.44 Further, despite inferences which could be drawn from this specific

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historical evidence, under the natural law theory of interpretation, the sources of interpretation other than history would override this historical evidence in any event.45

McCulloch v. Maryland has remained a vital precedent in constitutional law. Chief Justice Marshall crafted a relatively deferential approach towards judicial review of congressional enactments. Once a legitimate governmental interest is established, all that need be established is that the legislative means are an “appropriate” way to advance that legitimate end.

While McCulloch’s holding, and most of its reasoning, have rarely been questioned by later Supreme Court majorities, during the formalist era, between 1873 and 1937, the Court did not always leave questions of the degree of necessity to Congress. During the Lochner era of the late 1800s until 1937, the Court applied a “reasonableness” test that, while never clearly defined, was similar to that proposed by Madison or Professor Barnett in that it second-guessed legislative judgment more than during the natural law era test of “appropriate” government action. The Lochner doctrine is discussed at § 17.1.2 nn.5-19, with Lochner v. New York excerpted at § 17.2.

As discussed at § 19.1 nn. 10, 19-26, since 1937 the Court has phrased the relevant test for the constitutionality of economic regulation under the Equal Protection Clause as whether the government action is “rationally related to a legitimate government interest.”46 This post-1937 phrasing reflects the same deference-to-government approach of the McCulloch test regarding “appropriate” legislation under the Necessary and Proper Clause. Indeed, the Court noted in United States v. Comstock,47 “We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a

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47 560 U.S. 126, 134-35 (2010), citing Sabri v. United States, 541 U.S. 600, 605 (2004). In Comstock, using a Necessary and Proper Clause analysis, the Court upheld 18 U.S.C. § 4248, which authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released, as long as the original confinement was within Congress’ power, either authorized by express constitutional text, such as for “counterfeiting” or “treason,” or a criminal law in furtherance of some other power, such as mail fraud statutes as related to the post office power. Id. at 135-38. See also United States v. Kebodeaux, 133 S. Ct. 2496 (2013) (Necessary and Proper Clause authorizes Congress to enact the Sex Offender Registration and Notification Act (SORNA) and apply it to an individual whose sentence for a qualifying offense was served before enactment of the Act, where the individual was subject, upon release, to similar registration requirements under the then-existing Wetterling Act); id. at 2505 (Roberts, C.J., concurring in the judgment); id. at 2508 (Alito, J., concurring in the judgment); id. at 2510 (Thomas, J., joined by Scalia, J., as to Parts I, II & III-B, dissenting) (SORNA usurps police power vested in the states).
constitutionally enumerated power.” The Court also indicated that the issue under the Commerce Clause of whether Congress could rationally think some activity has a substantial effect on interstate commerce is governed by the same minimum rationality review. Concurring in the judgment, Justices Kennedy and Alito indicated their belief that the Necessary and Proper Clause analysis, and the Commerce Clause analysis, may well require more justification than a mere Equal Protection rational relationship test. In dissent, Justice Thomas, joined by Justice Scalia, was more forceful in rejecting the majority’s deferential Necessary and Proper Clause analysis. However, the 5-Justice majority of the four liberal instrumentalis (Justices Stevens, Ginsburg, Breyer, and Sotomayor), and the deference-to-government Holmesian (Chief Justice Roberts), adopted this view.

§ 5.4 The Federal Commerce Clause Power as Originally Understood

In the early 1800s, broad interpretation of Congress' Commerce Clause power was opposed by Southern political interests who feared federal regulation of the slave trade, which, according to the Constitution, was possible beginning in 1808. Southern political interests were also concerned about the aggrandizing of centralized economic power in the large Northern corporate banking centers, such as New York, Philadelphia, and Boston. They preferred economic policy to be left to the market, or a matter of experimentation among the states, rather than a coordinated federal approach. Southern political strategy was thus to limit federal power to regulate commerce among the states.

For example, in 1817, President Madison vetoed a law for building national roads and canals because he said those matters were not enumerated and could not be included in regulating commerce among the states. In 1822, President Monroe vetoed repair of the Cumberland Road for similar reasons and sent a copy of his veto message to the Justices. Following Monroe’s veto, Justice Johnson sent President Monroe a letter saying that all the Justices agreed that McCulloch v. Maryland settled the matter in holding that the grant of a principal power carries all adequate and appropriate means of executing it, and selection of those means rests with Congress and the President, who are supreme. Without regard to justifying such a federal law as a necessary and proper adjunct to the Commerce Clause, such a law would be clearly constitutional today under

48 560 U.S. at 134-35, citing, inter alia, Gonzales v. Raich, 545 U.S. 1, 22 (2005).
49 Id. at 151-53 (Kennedy, J., concurring in the judgment); id. at 155-58 (Alito, J., concurring in the judgment).
50 Id. at 166-68 (Thomas, joined by Scalia, J., in all but Part III-A-1-b, dissenting).
52 30 Annals of Cong. 211, 211-12 (1817) (Madison’s veto); 46 Annals of Cong. 1838, 1849 (1822) (Monroe’s veto).
53 Quoted in 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 596-97 (1926).
Hamilton’s and Story’s views on the spending power of the General Welfare Clause, which the Supreme Court has adopted.

The first major Commerce Clause cased decided by the Supreme Court was *Gibbons v. Ogden,* excerpted below. That case involved whether Congress could pass laws regulating navigation in New York Harbor, and if Congress could pass such laws, how that affected the ability of states to pass laws on the same subject-matter. The case raised the question of what the terms “commerce” and “among the states” meant under the Commerce Clause.

On the first question, Marshall concluded that “commerce” included all kinds of commercial intercourse, including navigation. Marshall’s main argument in support of this conclusion was an argument of legislative, executive, and social practice. Marshall noted, “If commerce does not include navigation, the government of the Union has no direct power over that subject. . . . Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.” Marshall also relied upon an argument of purpose, noting, “The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.” A related provision argument also confirmed this reading. Article I, § 9, states that “no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another.” Marshall noted that in this context “commerce” clearly includes navigation because “the most obvious preference which can be given to one port over another, in regulating commerce, applies to navigation.”

These arguments of practice, purpose, and related provisions clearly outweighed for Marshall any more formalist-inspired argument that the literal textual definition of “commerce” relates only to buying and selling, and thus Congress’ power under the Commerce Clause should be so limited. According to dictionaries in the 18th Century, the term “commerce” was ordinarily defined as “Exchange of one thing for another; trade; traffick.” However, even early states’-rights advocates, such as St. George Tucker, famous for his 1803 annotated edition of Blackstone’s *Commentaries,* adopted the natural law emphasis on purpose to favor a broader reading of the Commerce Clause.

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54 22 U.S. 1 (1824).

55 *Id.* at 190-91.


While *Gibbons* held that “commerce” should be interpreted to include transportation of goods, the Court did not address directly the broader question of whether “commerce” was limited to buying, selling, and transporting goods, or included other kinds of commercial activity, such as manufacturing goods, mining raw materials, or growing crops. However, Chief Justice Marshall did note that “[t]he 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.” The phrase “internal concerns” suggests a broad reading of “commerce” to include all kinds of economic activity. Further, Marshall noted that the term “commerce” in the Commerce Clause also modified the phrases “with foreign nations” and “with the Indian tribes,” and that it has been “universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations.” Marshall concluded, “If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence” and thus be equally applicable to commerce “among the several States.”

It has been argued that despite these passages, Marshall conceived of commerce as not including these other kinds of economic activity, because Marshall indicated, in a part of *Gibbons v. Ogden* not excerpted below, that “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpikes, ferries, etc., are components parts of this mass” of subject-matters for state regulation. However, as Marshall made clear in *Gibbons*, while the federal government has “[n]o direct general power over these objects,” the “legislative power of the Union can reach them . . . for national purposes,” and the federal government “may use means also employed by a State, in the exercise of its acknowledged power.”

Cases following *Gibbons* before the Civil War did not raise this precise issue because the federal government engaged in virtually no regulation of manufacturing, mining, or agricultural activities during this time. A few bills were passed by Congress aiding financing of canals and other projects during the 1820s, and were signed by Presidents James Monroe and John Quincy Adams. In 1852, Congress passed a bill providing for the regulation and licensing of steamboats, including rules regarding boiler construction. This Act contributed to a dramatic decline in deaths by boiler explosions on steamboats that had caused more than 750 deaths during 1850 and 1851. However, such congressional activity was limited and sporadic. For example, after the Panic of 1837, petitions from farmers in 1838 and thereafter requested a federal Department of Agriculture. The Department was not created until 1862, after the Southern states, who opposed federal regulation of agriculture,

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58 22 U.S. at 192-95.


60 22 U.S. at 203-04.
had left the Union. With the exception of federal tariff laws, regulation of economic activity in the United States prior to the Civil War was predominantly a matter of state law.\textsuperscript{61}

After the Civil War, the closest the Supreme Court came to discussing the issue during the natural law era was in 1868 in \textit{Paul v. Virginia}.\textsuperscript{62} In this case, the Court upheld a state statute regulating an insurance contract, in part because the statute conflicted with no federal law. Foreshadowing the approach soon to be adopted during the formalist era, the Court noted in \textit{dicta} that the purchase of insurance was not “commerce,” and thus the federal government could not regulate insurance contracts even if the federal government had attempted to do so. Despite this suggestion of a limitation on what is “commerce,” the issue of whether “commerce” includes all kinds of commercial activity, or only buying, selling, and transportation, was left substantially unresolved during the natural law era.

As to the second question, how to interpret the phrase “among the several States,” the facts in \textit{Gibbons} presented an easy case, since the navigation at issue in the case involved traveling the New York Harbor between New York and New Jersey. Any definition of “among” would include such activity. Nevertheless, Marshall presented in \textit{Gibbons} a more complete theory of how the term “among” should be read. Focusing on the purpose of the Commerce Clause to provide national economic solutions to national economic problems, Marshall indicated that Congress could regulate commerce as long as the commercial activity “concerns more states than one.” On the other hand, noted Marshall, Congress does not have the power to regulate economic activities “which are completely within a particular state, which do not affect other states, and with which is it not necessary to interfere, for the purpose of executing some of the general powers of the government.”\textsuperscript{63}

This doctrine, applied faithfully, would seem to leave only a few matters of exclusively internal commerce for the states. For example, the Court stated that the federal government could regulate the purely intrastate activity of a steamer that transported goods and people between cities in the state of Michigan in the 1871 case, \textit{The Daniel Ball},\textsuperscript{64} because “it is admitted that the steamer was engaged in shipping and transporting down Grand River goods destined and marked for other States than Michigan. . . . So far as [the ship] 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.”


\textsuperscript{62} 75 U.S. (8 Wall.) 168, 182-85 (1868).

\textsuperscript{63} 22 U.S. at 195.

\textsuperscript{64} 77 U.S. (10 Wall.) 557, 565 (1871).
Once it was determined in Gibbons v. Ogden that Congress could regulate navigation in New York Harbor, the question arose whether the New York State regulation of navigation could stand. Justice Johnson, concurring, said that New York's law would be invalid even without the federal law because the grant of power to regulate commerce among the states carries the whole subject, leaving nothing for the states to act upon. Justice Marshall indicated, "There is great force in this argument, and the court is not satisfied that it has been refuted."

However, Justice Marshall adopted in Gibbons a theory of concurrent federal and state power to pass laws on many subjects, each government seeking its own legitimate purposes, with federal law supreme in case of conflict. Under this approach, a state can regulate subjects that Congress may also regulate if the state's purpose is not to regulate commerce among the states, but for the state's own internal regulatory reasons, and the state law is not inconsistent with federal law. Marshall concluded in Gibbons that the Court need not decide between the Johnson approach and the concurrent jurisdiction approach because the federal license law granted a power with which the New York law conflicted. Thus, the New York law was invalid in any event.65

A few years later, in Willson v. Black Bird Creek Marsh Co.,66 excerpted below, Marshall applied the theory of concurrent power by holding that Delaware, for the purpose of improving lands adjacent to a navigable creek, could build a dam on the creek if that did not conflict with an act of Congress. Marshall said that state laws enacted for the purpose of regulating their own purely internal affairs are constitutional if not within a constitutional prohibition unless they conflict with a valid act of Congress. Here, Congress had passed no act with which the state law conflicted, and thus the state law was not "repugnant to the power to regulate commerce in its dormant state."

There is also a possible argument that the term "regulate" in the Commerce Clause only involves the power to limit commerce, but not the power to ban some activity entirely.67 Given the purpose of the Commerce Clause to solve national economic problems, it is no surprise that Marshall instead read the term "regulate" to give a plenary power to Congress to prescribe rules, which would include authorizing or banning the activity entirely, and that later Supreme Courts in every era of interpretation have uniformly adopted the same view.68

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65 22 U.S. at 204
66 27 U.S. 245, 252 (1829).
67 See Barnett, supra note 56, at 139-46 (questioning Congress’ ability to prohibit commerce).
68 See, e.g., Gibbons v. Ogden, 22 U.S. 1, 17-18 (1824) (Congress’ commerce power is plenary, and extends to prohibiting state regulation of commercial activity); Champion v. Ames, 188 U.S. 321 (1903) (banning interstate transportation of lottery ticket); United States v. Darby, 312 U.S. 100 (1941) (prohibiting shipment of lumber by workers paid less than the minimum wage).
A limitation on the term “regulate” was stated in 2012. In *National Federation of Independent Business v. Sebelius*, a 5-Justice majority held that the individual mandate provision of the Patient Protection and Affordable Care Act of 2010 (Obamacare), which requires individuals to purchase health insurance by 2014 or pay a penalty, was not a “regulation” of commerce, but rather “mandating” commerce, since it required individuals to purchase insurance, rather than regulate activity already being done. Since the text of the Commerce Clause only gives Congress the power “to Regulate Commerce,” these five Justices concluded that the mandate could not be authorized by the Commerce Clause. In dissent, four Justices concluded that the insurance mandate was a regulation of commerce, since at some point in their lives every individual will need health care, and thus individuals by being alive should be viewed as participating in the health care market. Despite these conclusions under the Commerce Clause, a different 5-4 majority held the mandate was authorized by the Taxing Power, discussed at § 7.1.1 nn.7-12 and excerpted at § 7.1.1.

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**Gibbons v. Odgen**  
22 U.S. 1 (1824)

[Ed.: The New York legislature had granted an exclusive license to Livingston and Fulton to navigate on the Hudson River between New York and New Jersey. That law was challenged by a competitor who had a federal license to participate in the coasting trade, which included the Hudson. The New York courts upheld the exclusive privilege granted by New York law.]

Chief Justice MARSHALL delivered the opinion of the court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant —

1st. To that clause in the constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws; and their Legislature, their Council of Revision, and their Judges, have repeatedly concurred in this opinion. It is supported by great names – by names which have all the titles to consideration that virtue, intelligence, and office,

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69 132 S. Ct. 2566, 2586-93 (2012) (Roberts, C.J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Part I, II, and III-C); *id.* at 2642-43 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

70 *Id.* at 2609 (Ginsburg, J., joined by Sotomayor, J., and joined as to Parts I, II, III, and IV by Breyer & Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part).
can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this Court, while it respects, not to bow to it implicitly; and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to
the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. 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. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted – that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.
The 9th section of the 1st article declares, that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. 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.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them.

Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.
It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. 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. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry – 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. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. 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. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends, that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative, acts, and judicial decisions; and have drawn arguments from all these sources, to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system.
The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section, as supporting their opinion. They say, very truly, that limitations of a power, furnish a strong argument in favour of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent, may still be made.

That this restriction shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends 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, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.
Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

This opinion has been frequently expressed in this Court, and is founded, as well on the nature of the government as on the words of the constitution. 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.

This act demonstrates the opinion of Congress, that steam boats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

This Court is, therefore, of opinion, that the decree of the Court of New York for the Trial of Impeachments and the Correction of Errors, affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New York with the steam boats the Stoudinger and the Bellona, by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled: and this Court doth further DIRECT, ORDER, and DECREE, that the bill of the said Aaron Ogden be dismissed, and this same is hereby dismissed accordingly.

Justice JOHNSON, concurring.

The judgment entered by the Court in this cause, has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way.
The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license.

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Willson v. Black-Bird Creek Marsh  
27 U.S. 245 (1829)

Chief Justice MARSHALL delivered the opinion of the court.

The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.

Undoubtedly the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided.

The plaintiffs sustain their right to build a dam across the creek by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

The plea does not controvert the existence of the act, but denies its capacity to authorise the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the act; and the judgment of the court must have been in favour of its validity. Its consistency with, or repugnancy to the constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This
Court has repeatedly decided in favour of its jurisdiction in such a case. Martin vs. Hunter's lessee, Miller vs. Nicholls, and Williams vs. Norris, are expressly in point. They establish, as far as precedents can establish any thing, that it is not necessary to state in terms on the record, that the constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the judicial act, if the record shows, that the constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favour of the party claiming under such law.

The jurisdiction of the Court being established, the more doubtful question is to be considered, whether the act incorporating the Black Bird Creek Marsh Company is repugnant to the constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorised by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several states."

If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

There is no error, and the judgment is affirmed.
CHAPTER 6: MODERN COMMERCE CLAUSE DOCTRINE

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§ 6.1 Commerce Clause Power Between 1873-1937: Formalist View

During the formalist era, the majority of the Supreme Court gave a more literal reading to the terms “commerce” and “among the states.” Reflecting the formalist emphasis on literal, textual meaning, the Court departed from an emphasis on legislative and executive practice under the Constitution, and the purpose behind the Commerce Clause to provide national economic solutions to national economic problems, the twin focuses of Chief Justice Marshall’s opinion in Gibbons v. Ogden, excerpted at § 5.4. This formalist mode of interpretation also advanced the pro-business perspective of many of the Republican-appointed Justices to the Supreme Court during this period. Most of these Justices were former corporate attorneys, served as corporate or railroad directors, or otherwise had “an influential clientele of railroad, banking, oil, coal, iron, and steel interests.”1

With regard to the first issue of the definition of “commerce,” the formalist-era Court narrowed the concept of “commerce” to buying and selling, the “core” dictionary definition of “commerce,” as well as transportation incident thereto. The first set of cases in the 1880s involved state regulations of activity, where the more limited definition of commerce appeared in dicta. For example, in Coe v. Town of Errol,2 the Court held that a state could tax logs destined for export, because those logs were not articles of commerce until their interstate journey began, and thus questions of federal preemption could not arise. In Kidd v. Pearson,3 Iowa was allowed to ban the manufacture of liquor because manufacturing was held not to be interstate commerce, and neither were mining, agriculture, or domestic fisheries, commerce being defined as buying and selling and transportation incidental thereto. The exercise of federal power was thus indirectly inhibited by cases upholding state laws that suggested that the states had exclusive power over the subjects involved.


2 116 U.S. 517, 528-29 (1886).

3 128 U.S. 1, 9-12 (1888).
Federal regulation began to be ruled unconstitutional beginning in the 1890s. For example, in 1895, the Court held in *United States v. E.C. Knight Co.*, excerpted below, that the Sherman Act could not be applied to a “monopoly” in “manufacture” because “[c]ommerce succeeds to manufacture, and is not a part of it.” In 1918, in *Hammer v. Dagenhart*, excerpted below, over a 4-Justice dissent authored by Justice Holmes, the Court held that Congress could not prevent shipment in interstate commerce of goods made by children who worked longer hours than permitted since the evil occurred during the manufacturing process before the goods became articles of commerce, which would occur when they were being transported. In the mid-1930s, the Court indicated a willingness to invalidate much of President Roosevelt's "New Deal," including regulations of agriculture, manufacturing, and mining. These rulings were all inconsistent, of course, with legislative and executive practice in passing the bills, including during the natural law era, where Congress created the Department of Agriculture in 1862.

Despite this narrowing, the Court did not adopt a more extreme version of formalism that would have limited the Commerce Clause power only to the core dictionary definition of buying and selling. The natural law-era precedents of *Gibbons, Willson, and The Daniel Ball* were maintained, the Court stating in 1878 in *Hannibal v. Husen*, "Transportation is essential to commerce, or rather it is commerce itself." Indeed, these precedents were extended in cases like *Champion v. Ames* excerpted below, which involved transporting a lottery ticket across state lines. In *Ames*, this more moderate formalist view prevailed by just one vote, with four more extreme formalist Justices in dissent stating that if “a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company.”

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4 156 U.S. 1, 12-14 (1895).

5 247 U.S. 251 (1918); *id.* at 277-81 (Holmes, J., joined by McKenna, Brandies & Clarke, JJ. dissenting).

6 *See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)* (Congress cannot regulate prices of a chicken slaughterhouse because the transactions occur after the chickens have come to rest and, thus, are intrastate); *Carter v. Carter Coal Co., 298 U.S. 238 (1936)* (Congress cannot regulate prices, wages, or hours in the mining industry because mining is a local activity that affects interstate commerce only indirectly); *United States v. Butler, 297 U.S. 1 (1936)* (Congress cannot regulate crop acreage because farming is not in interstate commerce).

7 95 U.S. 465, 470 (1878).

8 188 U.S. 321 (1903). *See also Hipolite Egg Co. v. United States, 220 U.S. 45 (1911)* (transporting impure food and drugs across state lines); *Hoke v. United States, 227 U.S. 308 (1913)* (transporting women across state lines for the purpose of prostitution).

9 188 U.S. at 371 (Fuller, C.J., joined by Brewer, Shiras & Peckham, JJ., dissenting).
With regard to the second issue of defining the phrase “among the several States,” the Court also adopted a moderate formalist view. The extreme view would have been that only activity literally crossing state lines could be defined as commerce among the states. However, in *The Shreveport Rate Cases,* excerpted below, with two Justices dissenting, the Court permitted the Interstate Commerce Commission to adjust intrastate railroad rates to prevent discrimination between intrastate and interstate rates because Congress can regulate the instruments of commerce "in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce."

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**United States v. E.C. Knight Co.**

156 U.S. 1 (1895)

Chief Justice FULLER, delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations, contrary to the act of congress of July 2, 1890 [The Sherman Antitrust Act].

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly.

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10 Houston, East & West Texas Railway v. United States (*The Shreveport Rate Cases*), 234 U.S. 342, 355 (1914). See also Swift Co. v. United States, 196 U.S. 375, 397, 399 (1905) (the Sherman Act could be applied to price fixing in a stock yard because “its affects upon commerce among the States is not accidental, or secondary, remote or merely probable,” but instead “is a typical, constantly recurring course” making the affect of that price-fixing “a current of commerce”); Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 576-77 (1886) (power to regulate interstate railroad rates is exclusively in Congress, even as to trips within a state).
whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power [of Congress] and of the police power [of the states], and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce.

Justice HARLAN, dissenting.

What is commerce among the states? The decisions of this court fully answer the question. “Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.” It does not embrace the completely interior traffic of the respective states, – that which is “carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states” – but it does embrace “every species of commercial intercourse” between the United States and foreign nations and among the states, and therefore it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the people of the United States. “Commerce, as the word is used in the constitution, is a unit,” and “cannot stop at the external boundary line of each state, but may be introduced into the interior.” “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.”

These principles were announced in Gibbons v. Ogden, and have often been approved. It is the settled doctrine of this court that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected.

The power of congress covers and protects the absolute freedom of such intercourse and trade among the states as may or must succeed manufacture and precede transportation from the place of purchase. . . . Each part of such trade is then under the protection of congress. And yet, by the opinion and judgment in this case, if I do not misapprehend them, congress is without power to
protect the commercial intercourse that such purchasing necessarily involves against the restraints and burdens arising from the existence of combinations that meet purchasers, from whatever state they come, with the threat – for it is nothing more nor less than a threat – that they shall not purchase what they desire to purchase, except at the prices fixed by such combinations. A citizen of Missouri has the right to go in person, or send orders, to Pennsylvania and New Jersey for the purpose of purchasing refined sugar. But of what value is that right if he is confronted in those states by a vast combination, which absolutely controls the price of that article by reason of its having acquired all the sugar refineries in the United States in order that they may fix prices in their own interest exclusively?

In my judgment, the citizens of the several states composing the Union are entitled of right to buy goods in the state where they are manufactured, or in any other state, without being confronted by an illegal combination whose business extends throughout the whole country, which, by the law everywhere, is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the states cannot coexist with such combinations.

Champion v. Ames
188 U.S. 321 (1903)

Justice HARLAN delivered the opinion of the court.


. . . The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce 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; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come, then, to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one state to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one state to another.
We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that the statute in question does not regulate the carrying of lottery tickets from state to state, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one state to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to prohibit, but only to regulate. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In Gibbons v. Ogden it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress, in prescribing a particular rule, has exceeded its power under the Constitution. While our government must be acknowledged by all to be one of enumerated powers (McCulloch v. Maryland, 4 Wheat. 316, 405, 407), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, “must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.” 4 Wheat. 421.

We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2d, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen v. Virginia, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is
among the most important duties of government, this court said: “Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.” In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no state may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. Stone v. Mississippi, 101 U.S. 814; Douglas v. Kentucky, 168 U.S. 488.

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution.

We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress – subject to the limitations imposed by the Constitution upon the exercise of the powers granted – has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

Chief Justice FULLER, with whom concur Justice BREWER, Justice SHIRAS, and Justice PECKHAM, dissenting:

The lottery ticket purports to create contractual relations, and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one state, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. Paul v. Virginia, [75 U.S. (8 Wall.) 168 (1868)].

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one state to another, is to transform a non-commercial article into a
commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from state to state.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the states all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government.

Houston, East & West Texas Railway v. United States (The Shreveport Rate Cases)
234 U.S. 342 (1914)

Justice HUGHES delivered the opinion of the court.

These suits were brought in the commerce court by the Houston, East & West Texas Railway Company and the Houston & Shreveport Railroad Company, and by the Texas & Pacific Railway Company, respectively, to set aside an order of the Interstate Commerce Commission, dated March 11, 1912, upon the ground that it exceeded the Commission's authority. Other railroad companies intervened in support of the petitions, and the Interstate Commerce Commission and the Railroad Commission of Louisiana intervened in opposition. The petitions were dismissed. 205 Fed. 380, 391.

The order of the Interstate Commerce Commission was made in a proceeding initiated in March, 1911, by the Railroad Commission of Louisiana. The complaint was that the appellants, and other interstate carriers, maintained unreasonable rates from Shreveport, Louisiana, to various points in Texas, and, further, that these carriers, in the adjustment of rates over their respective lines, unjustly discriminated in favor of traffic within the state of Texas, and against similar traffic between Louisiana and Texas. The carriers filed answers; numerous pleas of intervention by shippers and commercial bodies were allowed; testimony was taken and arguments were heard.

The gravamen of the complaint, said the Interstate Commerce Commission, was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they extended into Texas from Shreveport. The situation may be briefly described: Shreveport, Louisiana, is about 40 miles from the Texas state line, and 231 miles from Houston, Texas, on the line of the Houston, East & West Texas and Houston & Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Texas, on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas, were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial, and injuriously affected the commerce of Shreveport.
Congress is empowered to regulate, – that is, to provide the law for the government of interstate commerce; to enact “all appropriate legislation” for its “protection and advancement” (The Daniel Ball, 10 Wall. 557, 564); to adopt measures “to promote its growth and insure its safety” (Mobile County v. Kimball, 102 U.S. 691, 696, 697); “to foster, protect, control, and restrain” (Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. Co.] 223 U.S. 1, 47, 53, 54. Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. 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 state, and not the nation, would be supreme within the national field.

It is to be noted – as the government has well said in its argument in support of the Commission's order – that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the state cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long and short haul provision of the Kentucky Constitution, adopted in 1891, which the court had before it in Louisville & N. R. Co. v. Eubank, 184 U.S. 27. The state court had construed this provision as embracing a long haul, from a place outside to one within the state, and a shorter haul on the same line and in the same direction between points within the state. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce because “it linked the interstate rate to the rate for the shorter haul, and thus the interstate charge was directly controlled by the state law.” See 230 U.S. at 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

. . . Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.
Justice DAY delivered the opinion of the Court.

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock p.m., or before the hour of 6 o'clock a.m.?

The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce “consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.” The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U.S. 439.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. “When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.” Mr. Justice Jackson in Re Greene (C. C.) 52 Fed. 113. This principle has been recognized often in this court. Coe v. Errol, 116 U.S. 517; Bacon v. Illinois, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. Kidd v. Pearson, 128 U.S. 1, 21.

The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
Justice HOLMES, dissenting. Justice McKENNA, Justice BRANDEIS, and Justice CLARKE concur in this opinion.

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States, in which within thirty days before the removal of the product children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute – that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. Champion v. Ames, 188 U.S. 321, 355, 359.

The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in Champion v. Ames. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.
§ 6.2  The Holmesian Era: The Post-1937 Broadening of Federal Commerce Power

The practical result of formalist-era doctrine was that it was left to states to deal with problems of working conditions, monopoly practices, or child labor, and business interests could play one state off against another by threatening to relocate if any state regulated too vigorously.\(^\text{11}\) In 1937, this formalist analysis gave way to a Holmesian analysis which took note of the felt necessities of the times. This took place in 1937 after moderate formalists, Chief Justice Hughes and Justice Roberts, changed their minds regarding a proper interpretation of the Commerce Clause and joined non-formalist Justices Brandies, Stone, and Cardozo to make a 5-Justice non-formalist majority.

As noted at § 6.1 n.6, in the mid-1930s the formalist-era Court indicated a willingness to invalidate much of President Roosevelt's "New Deal," including regulations of agriculture, manufacturing, and mining, through following the \textit{E.C. Knight} doctrine that “commerce succeeds to” agriculture, manufacturing, and mining, and is not part of it until transportation occurs. In the Spring of 1937, subsequent to his and the Democratic Party’s landslide victory in the 1936 election, President Roosevelt sought to enlarge the Court in order to “pack” it with Justices who would change the formalist-era Commerce Clause doctrine and uphold "New Deal" economic regulations. Roosevelt’s specific proposal was to add one new Justice for each current Justice over 70 years of age, if that Justice did not retire within six months. In 1937, this would have given Roosevelt 6 new appointments to the Court, increasing the Court’s membership from 9 to 15, and would have tipped the balance on the Court in favor of upholding “New Deal” regulations.\(^\text{12}\) As noted at § 10.1 text following n.3, it is up to Congress to determine the size of the Court.

Before the “Court-Packing Plan” was considered by Congress, Chief Justice Hughes and Justice Roberts, who had sided more often with formalists prior to 1937, but who were moderate formalists with Holmesian leanings, began to decide cases upholding the power of Congress and the states to regulate economic matters.\(^\text{13}\) Given this shift, the “Court-Packing Plan” became unnecessary and it died in Congress during the summer of 1937. At the time, because it appeared the switch was linked to the “Court-Packing Plan,” this switch in voting gave rise to the phrase, “the switch in time


\(^{13}\) \textit{See} NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1, 36-43 (1937). Indeed, Chief Justice Hughes had already broke with the formalist Justices in a related \textit{Lochner} “liberty of contract” case in June, 1936 in \textit{Morehead v. People of the State of New York ex rel. Tipaldo}, 298 U.S. 587 (1936) (New York minimum wage law for women unconstitutional); \textit{id. at} 618-19, 631 (Hughes, C.J., joined by Brandies, Stone & Cardozo, JJ., dissenting). Justice Roberts still voted with the formalist Justices in \textit{Tipaldo} to create a 5-4 opinion striking down the law, discussed at § 17.1.2 nn.24-25.
that saved nine.” As subsequent historical documents reveal, the initial shift in voting was made at one of the Court’s weekly conferences after the November, 1936 elections, which Roosevelt won in a landslide, but before the “Court-Packing Plan” was announced in 1937.\textsuperscript{14} The rejection of formalism continued after 1937 because President Roosevelt got to make a number of Court appointments between 1937 and 1941, allowing him to replace all four extreme formalists then on the Court – Justices Van DeVanter, McReynolds, Sutherland, and Butler – with non-formalists.

With regard to the first issue of interpretation under the Commerce Clause, the Holmesian Court adopted the view that commercial activities like agriculture, manufacturing, or mining, in addition to buying, selling, and transportation, and disposing of goods as well, met the first part of the Commerce Clause test that the regulation be a regulation of “commerce” because all such economic activity is part of the “stream of commerce.” Thus, in 1937, in \textit{NLRB v. Jones & Laughlin Steel Corp.},\textsuperscript{15} the Court held that Congress can regulate any activity, not merely railroad transportation at issue in \textit{The Shreveport Rate Cases}, even though it has an intrastate character, if the activity is in the “stream of commerce” and has such a “close and substantial relation” to interstate commerce that control is appropriate to attain a legitimate end.

With regard to the second issue, the Court concluded that even indirect, secondary, or remote affects upon interstate commerce could satisfy the requirement that commerce was commerce “among the States” as long as the affects upon interstate commerce were “substantial.” Thus, in 1937, in \textit{Jones & Laughlin},\textsuperscript{16} the Court made much of the fact that the business was engaged in nationwide operations. In 1939, the Court held in \textit{NLRB v. Fainblatt} that the NLRB could also reach small garment manufacturers because small units, in the aggregate, contribute to a vast amount of commerce. In 1941, the Court held in \textit{United States v. Darby},\textsuperscript{18} excerpted below, that a purpose to control some aspect of local activity is irrelevant, and Congress can exclude from interstate commerce all goods produced in substandard conditions, overruling \textit{Hammer v. Dagenhart}.

In 1942, in \textit{Wickard v. Filburn},\textsuperscript{19} excerpted below, Justice Jackson said for the Court that even if an activity is local, it can be regulated by Congress if it exerts a substantial economic affect when taken together with actions of others similarly situated. Thus, in \textit{Wickard}, the Court upheld the Agricultural Adjustment Act’s wheat allocation provisions, as applied to a wheat farmer who grew


\textsuperscript{15} 301 U.S. 1, 36-40 (1937).

\textsuperscript{16} Id. at 41-43.

\textsuperscript{17} 306 U.S. 601, 605-08 (1939).

\textsuperscript{18} 312 U.S. 100, 113-19 (1941).

\textsuperscript{19} 317 U.S. 111, 124-28 (1942).
wheat, mostly for use as feed on his own farm, on only 23 acres of land. This was so because while “appellee’s own contribution to the demand for wheat may be trivial . . ., his contribution, taken together with that of many others similarly situated, is far from trivial.” In 1944, Justice Black wrote for the Court in United States v. South-Eastern Underwriters Association that a nationwide business is not deprived of its interstate character merely because it is built on local sales contracts. This case rejected the limitation upon congressional power stated in Paul v. Virginia, where in 1868 the Court stated in dicta that Congress could not regulate the insurance industry, saying that such a business based on local contracts was not in interstate commerce.

As a result of these cases, the power of Congress under the Commerce Clause was much changed from 1936 to 1944. In 1936, Congress could only regulate interstate commerce, with commerce defined as buying, selling, and transportation, and activities directly affecting interstate commerce, such as occurred in Shreveport Rate. Congress could not regulate intrastate activities such as agriculture, manufacturing, and mining that affect interstate commerce only indirectly, such as the effect of shipment after production or transactions after goods have come to rest. By 1944, however, Congress could regulate any economic activity, including agriculture, manufacturing, and mining, if, considered in the aggregate, that activity could exert a substantial economic affect on interstate commerce so that federal regulation would be an appropriate means to obtain a legitimate end.

This doctrine edged quite close to the view of congressional power in Gibbons v. Ogden. The only apparent difference is that under Gibbons Congress could regulate any commercial activity which “concerns more States than one,” while under the Holmesian-era doctrine, the commercial activity had to have a “substantial affect” on interstate commerce for Congress to regulate. In practice, however, these two formulations are almost identical, given the Wickard aggregation principle, discussed above, that even if an activity is local, it can be regulated by Congress if it exerts a substantial economic affect when taken together with actions of others “similarly situated.” The Wickard principle virtually ensures that any economic activity which “concerns more States than one” would be viewed by the Court as having a “substantial affect” on interstate commerce.

United States v. Darby
312 U.S. 100 (1941)

Justice STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods “for interstate commerce” at other than prescribed wages and hours.

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act, and the reports of Congressional committees proposing the legislation, S.Rept. No. 884, 75th Cong. 1st Sess.; H.Rept. No. 1452, 75th Cong. 1st Sess.; H.Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H.Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for . . . interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions.

The power of Congress over interstate commerce “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution.” Gibbons v. Ogden, supra, 9 Wheat. 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. Kentucky Whip & Collar Co. v. Illinois Central R. Co., [299 U.S. 334]. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. Reid v. Colorado, [187 U.S. 137]; Lottery Case, [Ames, 188 U.S. 321]; Hipolite Egg Co. v. United States, [220 U.S. 45]; Hoke v. United States, [227 U.S. 308].

In the more than a century which has elapsed since the decision of Gibbons v. Ogden, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in Hammer v. Dagenhart, 247 U.S. 251 [(1918)]. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision 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. Brooks v. United States, supra; Kentucky Whip & Collar Co. v. Illinois Central R. Co., supra; Electric Bond & Share Co. v. Securities & Exchange Commission, 303 U.S. 419; Mulford v. Smith, 307 U.S. 38. 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. Reid v. Colorado, supra; Lottery Case, supra; Hipolite Egg Co. v. United States, supra; Seven Cases v. United States,
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.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch v. Maryland, 4 Wheat. 316, 421. Cf. United States v. Ferger, 250 U.S. 199.

In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. Kidd v. Pearson, 128 U.S. 1; Bacon v. Illinois, 227 U.S. 504; Heisler v. Thomas Colliery Co., 260 U.S. 245; Oliver Iron Mining Co. v. Lord, 262 U.S. 172.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 466. A recent example is the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38, 40; National Labor Relations Board v. Fainblatt, 306 U.S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.

Wickard v. Filburn
317 U.S. 111 (1942)

Justice JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and
a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.
It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect 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. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

§ 6.3 The Instrumentalist Era: Further Broadening of Federal Commerce Power

During the instrumentalist era between 1954 and 1986, the Court not only edged closer to the *Gibbons v. Ogden* formulation, but went beyond the *Gibbons* formulation of when a commercial activity meets the Commerce Clause test of being “commerce among the several States.”

With regard to the first part of the Commerce Clause test, whether the activity being regulated is “commerce,” *dicta* in some of the instrumentalist-era cases suggested that a finding that the activity is commercial in nature is no longer required. It would be enough if the activity, whether commercial or not, had the requisite affect on interstate commerce to satisfy the “among the States” prong of what previously had been regarded as a two-pronged test. Thus, in *Heart of Atlanta Motel v. United States*,21 the Court stated that the Civil Rights Act of 1964 was constitutional, because the activity it regulated, racial discrimination at hotels generally open to the public, affected the movement of persons across state lines. If individuals knew they could be discriminated against on racial grounds, they would be less likely to travel. Similarly, in *Perez v. United States*,22 a criminal law banning extortionate credit transactions was constitutional because of the affect of extortionate credit on interstate organized crime. Indeed, Congress was permitted to require in *Preseault v. Interstate Commerce Commission*23 the preservation of railroad rights-of-way not currently in service, allowing interim use of the land as a recreational trail. The Court held that Congress could decide that every line is a potentially valuable national asset that could eventually affect interstate commerce, and thus merits preservation, even if no future rail use is currently foreseeable.
With regard to the second issue of what constitutes commerce “among the states,” the Gibbons formulation only required that the commerce “affects other states,” without a requirement that this affect be “substantial.” In Hodel v. Indiana and in Russell v. United States, the majority opinions also spoke of an “affect” on commerce, but did not specify that the affect must be "substantial," language which provoked Justice Rehnquist, concurring in Hodel, to insist on the Holmesian-era phrasing that Congress can regulate intrastate activity only if it has a "substantial" affect on commerce. In addition, the instrumentalist cases made clear, in cases like Katzenbach v. McClung, that the test for whether an activity "affects interstate commerce" is not what a court concludes from its own independent review of the facts, but whether there is any “rational basis” for a finding by Congress that a class of activity, in the aggregate, affects interstate commerce. In addition, the particular intrastate activity involved in the litigation need not itself affect commerce where the general activity regulated by the statute, in the aggregate, affects commerce. And it is not necessary that every facet of a program directly relate to a valid congressional goal. It is enough that the entire scheme, as a whole, satisfy the McCulloch test of being “rationally related to a legitimate government interest.” All of these instrumentalist-era doctrines support broad federal power to regulate, which is consistent with a liberal instrumentalist judicial predisposition to support governmental regulatory programs in general.

This line of cases did not directly alter the two-part Commerce Clause test, however, because in each case economic activity was being regulated. Thus, the civil rights law in Heart of Atlanta Motel involved the economic transaction of renting a hotel room. The criminal law in Perez involved the economic crime of extortionate credit. Even the railroad right-of-way in Preseault involved something that was a potentially valuable economic asset. Thus, although the general reasoning in these cases seemed to dispense with an independent requirement that the activity being regulated be commerce, and focused only on whether the activity being regulated had an affect on interstate commerce, the core holdings of each of the cases involved an activity with a clear economic nexus.

Katzenbach v. McClung
379 U.S. 294 (1964)

Justice CLARK delivered the opinion of the Court.

This case was argued with No. 515, Heart of Atlanta Motel v. United States, decided this date, 379 U.S. 241, in which we upheld the constitutional validity of Title II of the Civil Rights Act of 1964
against an attack on hotels, motels, and like establishments. This complaint for injunctive relief against appellants attacks the constitutionality of the Act as applied to a restaurant. The case was heard by a three-judge United States District Court and an injunction was issued restraining appellants from enforcing the Act against the restaurant. 233 F. Supp. 815. On direct appeal, 28 U.S.C. §§ 1252, 1253 (1958 ed.), we noted probable jurisdiction. 379 U.S. 802. We now reverse.

Ollie's Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restaurant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Act. The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.

Ollie's Barbecue admits that it is covered by these provisions of the Act. The Government makes no contention that the discrimination at the restaurant was supported by the State of Alabama. There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress. The Government has contended that Congress had ample basis upon which to find that racial discrimination at restaurants which receive from out of state a substantial portion of the food served does, in fact, impose commercial burdens of national magnitude upon interstate commerce.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942): “That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” At 127-128.

We noted in *Heart of Atlanta Motel* that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. Against this background, we must conclude that while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but “representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.” Polish National Alliance of U.S. v. National Labor Relations Board, 322 U.S. 643, 648 (1944).
Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question— one answered in the affirmative by the court below— is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§ 201(b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs’, serving food that has come from out of the State. We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

§ 6.4  The Modern Natural Law Era: Return to the 2-Part Commerce Clause Test

In 1995, in United States v. Lopez,28 excerpted below, the Supreme Court summarized Commerce Clause precedents as holding that where “commerce” is involved, commerce “among the states” exists in three kinds of cases: (1) regulating “the use of the channels of interstate commerce,” as in the lottery case, Champion v. Ames; (2) protecting “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” as in The Shreveport Rate Cases; and (3) regulating “those activities that substantially affect interstate commerce,” as in the Darby and Wickard cases.

Two main issues have framed the Court’s recent elaboration of this Commerce Clause doctrine. The first is whether the Holmesian-era “substantial affects” test or the *Gibbons v. Ogden* and instrumentalist-era “affects” test will be used to determine commerce “among the States.” The second is whether to keep the traditional requirement that the activity regulated be “commerce,” or to adopt the suggestion in *dicta* in the instrumentalist-era cases that no independent “commerce” requirement need be satisfied and any activity can be regulated, whether economic or not, as long as that activity affects interstate commerce.

With regard to the first issue, as a doctrinal matter, there is much less to the debate than may initially appear. Even under the Holmesian-era “substantial affects” test, the *Wickard* aggregation analysis has meant that even very local affects can be regulated by Congress as long as the local affect exerts a substantial economic affect when taken together with actions of other similarly situated parties. Further, instrumentalist-era judges, as well as judges following the natural law approach of Marshall in cases like *Gibbons* and *McCulloch*, agree that the test is not what the Court must find, but whether there is any rational basis for a finding by Congress that a class of activity, in the aggregate, sufficiently affects interstate commerce. Given this, if the underlying activity being regulated is truly economic activity, it is likely that the substantial affects test will be met.

In *Lopez*, a 5-4 Court held that Congress violated its Commerce Clause powers in adopting the Gun-Free School Zones Act of 1990, which banned gun possession within 1000 feet of any school. In an opinion authored by Chief Justice Rehnquist, the Court required that the congressional legislation must apply to activity that "substantially affects" interstate commerce. Justices O’Connor and Kennedy joined Chief Justice Rehnquist and Justices Scalia and Thomas in this holding. Despite the “affects” language being more faithful to Chief Justice Marshall’s opinion in *Gibbons v. Ogden*, where the test was phrased only as whether the regulation “affects” or “concerns” more states than one, the history of precedents since 1937 using the “substantial affects” language appears to have convinced natural law Justices Kennedy and O’Connor to adopt that terminology today. In contrast, Justice Breyer’s dissent in *Lopez*, joined by Justices Stevens, Souter and Ginsburg, concluded that the Court should have adopted a “significant affects” test. Acknowledging that the Court had used various phrases to describe how much “affect” was required, Justice Breyer settled on the term “significant” because “the word ‘substantial’ implies a somewhat narrower power than recent precedents suggest.”

The second issue in the modern Commerce Clause cases – whether to keep the traditional requirement that the activity regulated be “commerce,” or to adopt the suggestion in *dicta* in the instrumentalist-era cases that no independent requirement need be done and that any activity, whether economic or not, can be regulated by Congress under the Commerce Clause as long as that activity affects interstate commerce – was also in the backdrop in *Lopez*. Justice Rehnquist noted

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29 *Id.* at 557-59.

30 *Id.* at 615-16.
in *Lopez* that the statute had nothing to do with “commerce” or any sort of economic enterprise.\(^{31}\) In his dissent, Justice Breyer rejected the notion that the regulated activity must itself be commerce as distinguished from its affect on commerce. He added that, in any event, schools serve both social and commercial purposes.\(^{32}\) Justice Rehnquist replied to Justice Breyer by stating that under Breyer's approach Congress could regulate not only all violent crimes, but also all activities that might lead to violent crime, including marriage, divorce, and custody, and Congress could regulate the educational process directly, based on a hypothetical substantial effect on interstate commerce.\(^{33}\)

All of these arguments were underdeveloped in *Lopez*, however, because of the 5-4 majority’s conclusion that the mere possession of a gun around a school did not substantially affect interstate commerce in any event. However, this second issue regarding whether the activity being regulated must be “commerce” in some sense came to the forefront in *United States v. Morrison*,\(^{34}\) excerpted below. *Morrison* involved the constitutionality of the Violence Against Women Act of 1994 (VAWA). That Act allowed victims of “gender-motivated violence” to bring federal civil-rights lawsuits against their attackers. In *Morrison*, it was relatively undisputed, as noted in Justice Souter’s dissent, joined by Justices Stevens, Ginsburg, and Breyer, that Congress had assembled a mountain of data regarding the effects on interstate commerce caused by lost days from work and lost productivity as a result of violence against women. Under the general reasoning of the instrumentalist-era precedents, that substantial affect would permit Congress to regulate without finding that the activity being regulated was commercial in nature.

For the 5-Justice majority, Chief Justice Rehnquist replied that it was not enough to find that the cost of crime and work days lost by victims had a substantial effect on commerce. That would permit Congress “to regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” Instead, the majority concluded that Congress may not regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate affect on interstate commerce.” This conclusion is consistent with the core holdings of the instrumentalist-era cases, which all involved some aspect of commercial activity. Thus, based upon the actual holdings, Rehnquist could accurately conclude in *Morrison*, “The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”\(^{35}\)

\(^{31}\) *Id.* at 561.

\(^{32}\) *Id.* at 628-29 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

\(^{33}\) *Id.* at 564-65.


\(^{35}\) *Id.* at 613, 617-18.
Looking to the future, it seems clear that *Lopez* and *Morrison*, while important, do not represent a major shift from the Court’s Commerce Clause doctrine. Thus, *Heart of Atlanta Motel* and *Katzenbach v. McClung* are still good law upholding congressional power to pass civil rights laws regarding renting a hotel room or buying food in a restaurant, as is *Perez*, regarding congressional power over economic criminal activity. And *Wickard* is still good law regarding aggregating affects on interstate commerce. In addition, without regard to any “substantial affects” analysis, Congress can also regulate under the first two categories listed in *Lopez*, use of the channels of interstate commerce (ala *Ames*) and protecting instrumentalities of interstate commerce (ala *Shreveport Rate*).

For example, five days after *Lopez* was handed down, the Court issue a unanimous *per curiam* decision in *United States v. Robertson.* Without regard to whether a single gold mine in Alaska had a substantial affect on interstate commerce, the Court held that Congress could regulate the ownership and operation of a gold mine in Alaska because some goods used at the mine had moved in interstate commerce, and some workers at the mine had come from out of state. Thus, under *Champion v. Ames*, Congress was regulating “the use of the channels of interstate commerce.” Under the second category listed in *Lopez*, Congress can also regulate purely intrastate activities if they threaten the instrumentalities of interstate commerce, or persons or things in interstate commerce, because that congressional regulation would then be “necessary and proper” to advance legitimate governmental ends, as it was in *The Shreveport Rate Cases*.

An example of how all of these various theories give Congress great power to regulate activities with an economic nexus of any kind occurred in 2005 in *Gonzales v. Raich*, excerpted below. In *Raich*, a 6-3 Court upheld application of the federal Controlled Substances Act (CSA) to intrastate growers and users of marijuana for medical purposes under the provisions of California law. The majority opinion by Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, reasoned, citing *Wickard v. Filburn*, that there was a rational basis for Congress to find that failure to regulate this class of activity could result, in the aggregate, in a substantial affect on the broad market for illegal drugs that Congress was regulating by the CSA. *Lopez* and *Morrison* were distinguishable because the laws in those cases did not regulate economic activity, whereas the activities regulated by the CSA, involving the production, distribution, and consumption of commodities, were “quintessentially economic.” Justice Scalia, concurring, said that in addition to a power to regulate activities having a substantial affect on interstate commerce, Congress has power under the *The Shreveport Rate Cases* to make its regulations of interstate commerce effective. Justice Scalia noted that even *Lopez* suggested that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”

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37 545 U.S. 1 (2005).

38 *Id.* at 14-33.

39 *Id.* at 33-42 (Scalia, J., concurring in the judgment). Justice O’Connor was joined in dissent by Chief Justice Rehnquist and Justice Thomas. Justice O’Connor concluded that “the homegrown
United States v. Lopez
514 U.S. 549 (1996)

Chief Justice REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). [FN1 The term “school zone” is defined as “in, or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” § 921(a)(25).] The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress “[t]o regulate Commerce . . . among the several States. . . .” U.S. Const., Art. I, § 8, cl. 3

[W]e have 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. See, e.g., Darby, 312 U.S., at 114; Heart of Atlanta Motel, [379 U.S.], at 256 (“T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917) [citing Lottery Case, Champion v. Ames, 188 U.S., at 321, 357]). 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. See, e.g., Shreveport Rate Cases, 234 U.S. 342 (1914); Southern R. Co. v. United States, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); Perez, [402 U.S.], at 150 (“F]or example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659”). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, Jones & Laughlin Steel, 301 U.S., at 37, i.e., those activities that substantially affect interstate commerce, Wirtz, [392 U.S.], at 196, n.27.

Within this final category, admittedly, our case law has not been clear whether an activity must “affect” or “substantially affect” interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare Preseault v. ICC, 494 U.S. 1, 17 (1990), with Wirtz, supra, at 196, n.27 (the Court has never declared that “Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities”). We
cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character.” Even if the activity was commercial in some sense, Justice O'Connor concluded, “There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market – or otherwise to threaten the CSA regime.” Id. at 49-56 (O'Connor, J., joined by Rehnquist, C.J., and Thomas, J., as to all but Part III, dissenting).

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conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, e.g., Preseault v. ICC, 494 U.S., at 17, the Government concedes that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” Brief for United States 5–6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. See McClung, 379 U.S., at 304; see also Perez, 402 U.S., at 156 (“Congress need [not] make particularized findings in order to legislate”). But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

The Government's essential contention, in fine, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. Brief for United States 17. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. See United States v. Evans, 928 F.2d 858, 862 (CA9 1991). Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. Heart of Atlanta Motel, 379 U.S., at 253. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.
We pause to consider the implications of the Government's arguments. The Government admits, under its “costs of crime” reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), 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.

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring.

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

Chief Justice Marshall announced that the national authority reaches "that commerce which concerns more States than one" and that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 22 U.S. 1 (1824). His statements can be understood now as an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise. The progression of our Commerce Clause cases from Gibbons to the present was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles.

The case that seems to mark the Court's definitive commitment to the practical conception of the commerce power is NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). . . . The deference given to Congress has since been confirmed [in] United States v. Darby, 312 U.S. 100, 116-117 (1941), overruled Hammer v. Dagenhart, supra. And in Wickard v. Filburn, 317 U.S. 111 (1942), the Court disapproved E. C. Knight and the entire line of direct-indirect and manufacture-production cases, explaining that "broader interpretations of the Commerce Clause [were] destined to supersede the earlier ones," 317 U.S. at 122, and "whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution," id., at 123, n.24. Later examples of the exercise of federal power where commercial transactions were the subject of regulation include Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), Katzenbach v. McClung, 379 U.S. 294 (1964), and Perez v. United States, 402 U.S. 146 (1971). These and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today.
The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). See also Gregory v. Ashcroft, 501 U.S. 452, 458-459 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); New York v. United States, [505 U.S. 142, 181 (1992)] ("The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power'") (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992). Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. Cf. New York v. United States, supra, at 155-169; FERC v. Mississippi, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the government
answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As the Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. Milliken v. Bradley, 418 U.S. 717, 741-742 (1974); Epperson v. Arkansas, 393 U.S. 97, 104 (1968). The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed. Cf. Rice, supra, at 230 ("We start with the assumption that the historic police powers of the States" are not displaced by a federal statute "unless that was the clear and manifest purpose of Congress"); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963).

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).


Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining. See Brief for National Conference of State Legislatures et al. as Amici Curiae 26-30 (injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments). These might include inducements to inform on violators where the information leads to arrests or confiscation of the guns,; programs to encourage

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the voluntary surrender of guns with some provision for amnesty; penalties imposed on parents or guardians for failure to supervise the child; laws providing for suspension or expulsion of gun-toting students; or programs for expulsion with assignment to special facilities. [Citations omitted].

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.

For these reasons, I join in the opinion and judgment of the Court.

Justice THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4844. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

At the time the original Constitution was ratified, “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary*586 of the English Language 361 (4th ed. 1773) (defining commerce as “Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick”); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) (“trade or traffic”); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (“Exchange of one thing for another; trade, traffick”). This understanding finds support in the etymology of the word, which literally means “with merchandise.” See 3 Oxford English Dictionary 552 (2d ed. 1989) (com – “with”; merci – “merchandise”). In fact, when Federalists and Anti–Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our “trade” is prudently regulated by Federal Government); id., No. 7, at 39-40 (A. Hamilton) (discussing “competitions of commerce” between States resulting from state “regulations of trade”); id., No. 40, at 262 (J. Madison) (asserting that it was an “acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government”); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New York, in id., at 107. [FN1. All references to The Federalist are to the Jacob E. Cooke 1961 edition.]

As one would expect, the term “commerce” was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, e.g., The Federalist No. 36, at 224 (referring to “agriculture, commerce, manufactures”); id., No. 21, at 133 (distinguishing commerce, arts, and industry); id., No. 12, at 74 (asserting that commerce and agriculture have...
shared interests). The same distinctions were made in the state ratification conventions. See, e.g., 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); id., at 336 (M. Smith at New York convention).

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace “commerce” with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place “with a foreign nation” or “with the Indian Tribes.” Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term “commerce” denoted sale and/or transport rather than business generally. According to that Clause, “[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.” U.S. Const., Art. I, § 9, cl. 6. Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word “commerce” in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that “substantially affect” interstate commerce. The Commerce Clause does not state that Congress may “regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In contrast, the Constitution itself temporarily prohibited amendments that would “affect” Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Art. V. Clearly, the Framers could have drafted a Constitution that contained a “substantially affects interstate commerce” Clause had that been their objective.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

[T]he Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce – both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words “rational basis” capture this leeway. See Hodel, supra, 452 U.S., at 276-277. Thus, the specific question before us, as the Court recognizes, is not whether the “regulated activity sufficiently affected interstate commerce,” but, rather, whether Congress could have had “a rational basis” for so concluding.
. . . Could Congress rationally have found that “violent crime in school zones,” through its effect on the “quality of education,” significantly (or substantially) affects “interstate” or “foreign commerce”? 18 U.S.C. §§ 922(q)(1)(F), (G). As long as one views the commerce connection, not as a “technical legal conception,” but as “a practical one, Swift & Co. v. United States, 196 U.S. 375, 398 (1905) (Holmes, J.), the answer to this question must be yes. Numerous reports and studies – generated both inside and outside government – make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. (See Appendix, infra, at 1665, for a sample of the documentation [and] complete citations to the sources referenced).

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them, ibid.; that 20 percent of those students have been threatened with guns, ibid.; and that, in any 6–month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U.S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, e.g., House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U.S. Dept. of Health 118-119 (1978) (school-violence victims suffer academically); compare U.S. Dept. of Justice 1 (1991) (gun violence worst in inner-city schools), with National Center 47 (dropout rates highest in inner cities). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Senate Labor and Human Resources Committee Hearing 39 (1993); U.S. Dept. of Health 118, 123-124 (1978). Congress could therefore have found a substantial educational problem — teachers unable to teach, students unable to learn – and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. See generally Seybolt; Rorabaugh; U.S. Dept. of Labor (1950). As late as the 1920's, many workers still received general education directly from their employers – from large corporations, such as General Electric, Ford, and Goodyear, which created schools within their firms to help both the worker and the firm. See Bolino 15-25. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. See id., at 11.) As public school enrollment grew in the early 20th century, see Becker 218 (1993), the need for industry to teach basic educational skills diminished. But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling, see Denison 243; that investment in “human capital” (through spending on education) exceeded investment in
“physical capital” by a ratio of almost two to one, see Schultz 26 (1961); and that the economic returns to this investment in education exceeded the returns to conventional capital investment, see, e.g., Davis & Morrall 48-49.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. See, e.g., MIT 32 (only about one-third of hand tool company's 1,000 workers were qualified to work with a new process that requires high-school-level reading and mathematical skills); Cyert & Mowery 68 (gap between wages of high school dropouts and better trained workers increasing); U.S. Dept. of Labor 41 (1981) (job openings for dropouts declining over time).

Following Lopez, Congress passed an amended Gun-Free School Zones Act which regulates the possession of guns around schools only if the gun “has moved in or that otherwise affects interstate or foreign commerce.” As a regulation of an article moving in interstate commerce, this amended statute is probably constitutional under the first of the three categories of commerce clause power mentioned at the beginning of Lopez, that is, an Ames rationale regulating “the use of the channels of interstate commerce.” Since virtually every gun has moved in interstate commerce, this current statute covers almost the same amount of activity as the statute struck down in Lopez.40

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United States v. Morrison
529 U.S. 598 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence.

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her.

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After the attack, Morrison allegedly told Brzonkala, “You better not have any . . . diseases.” Complaint ¶ 22. In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he “like[d] to get girls drunk and . . . .” Id., ¶ 31. The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. Lopez, 514 U.S., at 568 (citing Jones & Laughlin Steel, 301 U.S., at 30). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 124-128 (1942); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 277 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, ibid., but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See ibid. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from United States v. Lopez, 514 U.S. 549 (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from
representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment. Cf. Hodel, 452 U.S., at 278-279 (noting “extended hearings,” “vast amounts of testimony and documentary evidence,” and “years of the most thorough legislative consideration”).

Justice BREYER, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice GINSBURG join as to Part I-A, dissenting.

I

The majority holds that the federal commerce power does not extend to such “noneconomic” activities as “noneconomic, violent criminal conduct” that significantly affects interstate commerce only if we “aggregate” the interstate “effect[s]” of individual instances. Justice Souter explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone – a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A


The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, “noneconomic” activity taking place at economic establishments. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding civil rights laws forbidding discrimination at local motels); Katzenbach v. McClung, 379 U.S. 294 (1964) (same for restaurants). And it would permit Congress to regulate where that regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” Lopez, supra, at 561; cf. Controlled Substances Act, 21 U.S.C. § 801 et seq. (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader “Safe Transport” or “Workplace Safety” act?
More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce . . . among the several States," and to make laws "necessary and proper" to implement that power. Art. I, § 8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

Subsequent to Morrison, Congress has continued to pass versions of a Violence Against Women Act, using its Spending power, addressed at §§ 7.2.1-7.2.2, to aid states in combating violence against women. See Violence Against Women Reauthorization Act of 2013, Pub.-L 113-4, 127 Stat. 54 (March 7, 2013) (Title I: Enhancing Judicial and Law Enforcement Tools to Combat Violence Against Women; Title II: Improving Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking; Title III: Services, Protection, and Justices for Young Victims of Violence; Title IV: Violence Reduction Practices; Title V: Strengthening the Healthcare System's Response to Domestic Violence, Dating Violence, Sexual Assault, and Stalking; Title VI: Safe Homes for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking; Title VII: Economic Security for Victims of Violence; Title VIII: Protection of Battered Immigrants; Title IX: Safety for Indian Women; Title X: Safer Act (Debbie Smith grants for auditing sexual assault evidence backlogs; reports to Congress, reducing the rape kit backlog, oversight and accountability, and sunset); Title XI: Other matters (sexual abuse in custodial settings, anonymous online harassment, stalker database, federal victim assistants reauthorization, child abuse training programs for judicial personnel and practitioners reauthorization); Title XII: trafficking victims protection). Given the greater enforcement resources of states and local communities versus the limited number of federal enforcement agents, this approach may be as effective as the original Violence Against Women Act.

Gonzales v. Raich
545 U.S. 1 (2005)

Justice STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996,
California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. A "primary caregiver" is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 84 Stat. 1242, 21 U.S.C. § 801 et seq., to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts to obtain relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana.

The obvious importance of the case prompted our grant of certiorari. 542 U.S. 936 (2004). The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed
locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

Shortly after taking office in 1969, President Nixon declared a national "war on drugs." As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs. That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236.

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time. The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation. For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible. Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890, 26 Stat. 209, as amended, 15 U.S.C. § 2 et seq.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, e.g., Perez, 402 U.S., at 151; Wickard v. Filburn, 317 U.S. 111, 128-129 (1942). As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." Id., at 125. We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. See Perez, 402 U.S., at 154-155 (quoting Westfall v. United States, 274 U.S. 256, 259 (1927) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so")). In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." E.g., Lopez, 514 U.S., at 558 (emphasis deleted) (quoting Maryland v. Wirtz, 392 U.S. 183, 196, n.27 (1968)).
Our decision in *Wickard*, 317 U.S. 111, is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." *Wickard*, 317 U.S., at 118. Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

"The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." Id., at 127-128.

*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, id., at 115, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. See nn 20-21, supra. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez*, 514 U.S., at 557; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez*, 402 U.S., at 155-156; *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964). Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, 33 we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of
marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes, *post*, 162 L. Ed. 2d, at 44 (O'Connor, J., dissenting), it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with "any other illness for which marijuana provides relief," Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp. 2005), is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so.

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'Connor's dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

Justice SCALIA, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.
Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937). That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. See, e.g., Hodel, supra, at 281 (surface coal mining); Katzenbach, supra, at 300 (discrimination by restaurants); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (discrimination by hotels); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 237 (1948) (intrastate price-fixing); Board of Trade of Chicago v. Olsen, 262 U.S. 1, 40 (1923) (activities of a local grain exchange); Stafford v. Wallace, 258 U.S. 495, 517, 524-525 (1922) (intrastate transactions at stockyard). Lopez and Morrison recognized the expansive scope of Congress's authority in this regard: "[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." Lopez, supra, at 560; Morrison, supra, at 610 (same).

This principle is not without limitation. In Lopez and Morrison, the Court – conscious of the potential of the "substantially affects" test to "obliterate the distinction between what is national and what is local," Lopez, supra, at 566-567 (quoting A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935)); see also Morrison, supra, at 615-616 – rejected the argument that Congress may regulate noneconomic activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. Lopez, supra, at 564-566; Morrison, supra, at 617-618. "[I]f we were to accept [such] arguments," the Court reasoned in Lopez, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." Lopez, supra, at 564; see also Morrison, supra, at 615-616. Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," Lopez, supra, at 567, in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in Lopez, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in Lopez was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S., at 561. This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." Wrightwood Dairy Co., 315 U.S., at 119; see also United States v. Darby, 312 U.S. 100, 118-119 (1941); Shreveport Rate Cases, 234 U.S., at 353. As the Court put it in Wrightwood Dairy, where Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective." 315 U.S., at 118-119.
Although this power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from Lopez quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See Lopez, supra, at 561. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See Darby, supra, at 121.

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." Darby, 312 U.S., at 113. See also Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911); Lottery Case, 188 U.S. 321, 354 (1903). To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances – both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). See 21 U.S.C. §§ 841(a), 844(a). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice THOMAS join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. United States v. Lopez, 514 U.S. 549, 557 (1995); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Brecht v. Abrahamson, 507 U.S. 619, 635 (1993); Whalen v. Roe, 429 U.S. 589, 603, n 30 (1977). Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic
activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez*, supra, and *United States v. Morrison*, 529 U.S. 598 (2000). Accordingly I dissent.

What is the relevant conduct subject to Commerce Clause analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the Controlled Substances Act (CSA) in general. The Court's decision rests on two facts about the CSA: (1) Congress chose to enact a single statute providing a comprehensive prohibition on the production, distribution, and possession of all controlled substances, and (2) Congress did not distinguish between various forms of intrastate noncommercial cultivation, possession, and use of marijuana. See 21 U.S.C. §§ 841(a)(1), 844(a). Today's decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, i.e., by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation – including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation – recognize that medical and nonmedical (i.e., recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. See 21 U.S.C. § 812; Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2005). Respondents challenge only the application of the CSA to medicinal use of marijuana. Cf. United States v. Raines, 362 U.S. 17, 20-22 (1960) (describing our preference for as-applied rather than facial challenges). Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." *Lopez*, supra, at 583 (Kennedy, J., concurring); see also *Morrison*, supra, at 617-619; *Lopez*, supra, at 580 (Kennedy, J., concurring) ("The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required"); cf. *Garcia*, 469 U.S., at 586 (O'Connor, J., dissenting) ("[S]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers" under the Commerce Clause). California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in theaggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity
substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's opinion – the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, see Lopez, supra, at 565 ("depending on the level of generality, any activity can be looked upon as commercial") – the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. See Morrison, 529 U.S., at 611, n.4 (intrastate activities that have been within Congress' power to regulate have been "of an apparent commercial character"); Lopez, 514 U.S., at 561 (distinguishing the Gun-Free School Zones Act of 1990 from "activities that arise out of or are connected with a commercial transaction"). The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. Ibid. And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value.

The Court suggests that *Wickard*, which we have identified as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, supra, at 560, established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. 317 U.S., at 115-116. The AAA itself confirmed that Congress made an explicit choice not to reach – and thus the Court could not possibly have approved of federal control over – small-scale, noncommercial wheat farming. In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. Id., at 130, n.30. *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that *Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.
Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (i.e., whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress’ excursion into the traditional domain of States be justified.

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market – or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked eye." See Lopez, 514 U.S., at 563. And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.

In this regard, again, this case is readily distinguishable from Wickard. To decide whether the Secretary could regulate local wheat farming, the Court looked to "the actual effects of the activity in question upon interstate commerce." 317 U.S., at 120. Critically, the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." Id., at 125. After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. Id., at 127. With real numbers at hand, the Wickard Court could easily conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide. Id., at 128; see also id., at 128-129 ("This record leaves us in no doubt" about substantial effects).

The Court recognizes that "the record in the Wickard case itself established the causal connection between the production for local use and the national market" and argues that "we have before us findings by Congress to the same effect." Ante, 162 L. Ed. 2d, at 21 (emphasis added). The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes "swelling" in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents "is essential to effective control" over interstate drug trafficking. 21 U.S.C. §§ 801(1)-(6). These bare declarations cannot be compared to the record before the Court in Wickard.

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. . . . The Court also offers some arguments about the effect of the Compassionate Use Act on the national market. It says that the California statute
might be vulnerable to exploitation by unscrupulous physicians, that Compassionate Use Act patients may overproduce, and that the history of the narcotics trade shows the difficulty of cordonning off any drug use from the rest of the market. These arguments are plausible; if borne out in fact they could justify prosecuting Compassionate Use Act patients under the federal CSA. But, without substantiation, they add little to the CSA's conclusory statements about diversion, essentiality, and market effect. Piling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison*.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything – and the Federal Government is no longer one of limited and enumerated powers.

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). Further, the Government's rationale – that it may regulate the production or possession of any commodity for which there is an interstate market – threatens to remove the remaining vestiges of States' traditional police powers. See Brief for Petitioners 21-22; cf. *Ehrlich, The Increasing Federalization of Crime*, 32 Ariz. St. L. J. 825, 826, 841 (2000) (describing both the relative recency of a large percentage of federal crimes and the lack of a relationship between some of these crimes and interstate commerce). This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not intrusted to the government." *McCulloch*, supra, at 423.

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern," id., at 583 (Kennedy, J., concurring). The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in judgment). Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Following *Gonzales v. Raich*, the Bush and Obama Administrations engaged in some enforcement actions, although the focus of their efforts tended to be on larger, commercial outlets growing and selling marijuana, not isolated individuals, as in *Raich*. Federal enforcement has been complicated by the fact that state officials who wish to follow state law have a constitutional right not to aid the government in enforcing federal law, as discussed at § 8.2.2 nn.35-42. Most state police in states with medical marijuana laws, which were close to 20 states in 2014 (and 29 states and the District of Columbia by 2017), have not aggressively helped the federal government in enforcement actions,
leaving the federal government with tough choices given limited numbers of federal officers available to enforce the entire range of federal laws. The Obama Administration has also announced that it has no plans to enforce federal marijuana laws against recreational users in Colorado and Washington, two states which legalized recreational marijuana use for citizens over 21, starting in 2014. Since 2014, Alaska, California, Maine, Massachusetts, Nevada, Oregon, and Washington, D.C. have also legalized use. Thus, plaintiffs like Ms. Raich are not likely to be prosecuted today, even though the federal government retains the constitutional authority to prosecute based on _Raich_.

Recent cases in the United States Courts of Appeals, even before _Raich_, applied _Lopez_ and _Morrison_ in a narrow manner. In virtually all the court of appeals cases where the federal regulation was economically related, the court found the necessary substantial connection with interstate commerce. When they have not, the Supreme Court has shown a willingness to intervene.  

41 See, e.g., Rancho Viejo, LLC. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (preventing a large developer from construction that would harm an endangered species of arroyo toads was substantially related to interstate commerce because commercial real estate development, in the aggregate, substantially affects interstate commerce); GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (protecting five subterranean invertebrate species was upheld from a Commerce Clause attack because taking endangered species, in the aggregate, has a substantial effect on interstate commerce); United States v. Rayborn, 312 F.3d 229 (6th Cir. 2002) (federal arson statute could be applied to burning a church which was involved in interstate commerce through its radio broadcasts which brought in money and attendees from several states); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (no serious constitutional question when the United States Corps of Engineers prevented a landowner from affecting a wetland by digging a 1000-foot ditch which emptied into a roadside ditch that eventually led to navigable waters because Congress has long had power to protect navigable waters from injurious purposes and that permits regulation of non-navigable waters if necessary to achieve congressional goals). On court of appeals decisions after _Morrison_, see generally Daniel J. Lowenberg, *The Texas Cave Bug and the California Arroyo Toad “Take” on the Constitution’s Commerce Clause*, 36 St. Mary’s L. Rev. 149 (2004).

42 For example, on a 2-1 vote, an Eighth Circuit Court of Appeals panel held it was not a valid exercise of Congress’ Commerce Clause power to apply the Americans with Disabilities Act to ban a state from assessing a $2 annual fee for windshield placards authorizing the use of reserved parking spaces by physically disabled persons. The Eight Circuit noted in _Klingler v. Director, Department of Revenue_ that Congress had made no findings suggesting the existence of a substantial relationship between the fee and interstate commerce. It added that the effect of the placard fee on interstate commerce was much more speculative and attenuated than that of the racial discrimination in _Katzenbach_ and _Heart of Atlanta_. In response to _Klingler_, the Supreme Court vacated the judgment in light of _Gonzales v. Raich_, and on remand, the state abandoned the Commerce Clause challenge. The Eighth Circuit then held, consistent with other courts, that such a surcharge does constitute “discriminatory” treatment under the ADA and is properly banned. 366 F.3d 614 (8th Cir. 2004), judgment vacated, 545 U.S. 1111 (2005), on remand, 433 F.3d 1078, 1079, 1082 (2006).
Courts have also struggled with the question of the impact of Lopez’s holding on gun possession around a school on other areas where mere possession has been made a crime. For example, a range of federal statutes criminalize the production or possession of child pornography. In most cases, Courts of Appeals have found the requisite affects on interstate traffic in child pornography to uphold the statutes. When they have not, the Supreme Court has been willing to intervene.

Despite the limited impact of Lopez and Morrison in cases involving economic regulation, these cases nonetheless send a message that Congress should consider federalism when legislating near the outer reaches of its Commerce Clause power, and it should do something to make it clear how Congress perceives a connection between its regulation and commerce. Indeed, it seems likely that the main practical effect of Lopez and Morrison regarding economic regulation is to suggest that Congress buttress its Commerce Clause legislation with findings that show a connection between the legislation and a substantial affect on interstate commerce. Although such findings are not constitutionally required, a prudent Congress would indicate its view of the connection.

A second impact of Lopez and Morrison lies in the realm of statutory interpretation. For example, in Solid Waste Agency v. Army Corps of Engineers, the same 5-4 majority as in Lopez and Morrison refrained from ruling on whether Congress could authorize the Army Corps of Engineers to regulate abandoned sand and gravel pits that provided a habitat for migratory birds. Instead, the majority held that because of the constitutional problems that such an attempted delegation would present – what is the commercial activity that is being regulated, and what is the substantial affect on interstate commerce – the Court would read the Clean Water Act as not granting the Corps power over non-navigable, isolated, intrastate waters merely because of the presence of migratory birds. Justice Rehnquist noted that Congress does not ordinarily casually authorize administrative agencies to interpret a statute in a way that pushes the limits of congressional power, particularly if altering the federal-state framework by permitting federal encroachment upon a traditional state power.

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43 See, e.g., United States v. Adams, 343 F.3d 1024 (9th Cir. 2003) (criminal statute banning possession of commercially-produced child pornography constitutional, the court saying that those who possess and view child porn encourage its continued production and distribution); United States v. Holston, 343 F.3d 83 (2nd Cir. 2003) (intrastate use of camera equipment to produce child pornography feeds the national market for child pornography); United States v. Rodia, 194 F.3d 465 (3rd Cir. 1999) (a person viewing child pornography produced intrastate might develop an increased appetite for child pornography that could increase demand for interstate child pornography).

44 For example, in United States v. Maxwell, the Eleventh Circuit Court of Appeals ruled that mere possession of child pornography on a disk that, when blank, had moved in interstate commerce, was insufficient to create a substantial affect on interstate commerce, nor could Ames be used since the disk was blank, and thus did not contain child pornography, when it moved across state lines. The Supreme Court vacated this judgment in light of Gonzales v. Raich, and on remand the Eleventh Circuit upheld the constitutionality of the prosecution. 386 F.3d 1042 (11th Cir. 2004), judgment vacated, 546 U.S 801 (2005), on remand, 446 F.3d. 1210 (2006).

In contrast to Chief Justice Rehnquist’s use of the canon of interpretation to avoid constitutional problems if an interpretation of a statute is possible that avoids the constitutional issue, it has been noted that vigorous application of this canon, often associated with the 1806 case, *Murray v. The Schooner Charming Betsy*, may denigrate actual congressional or administration agency intent. In *Solid Waste Agency*, a dissent by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, found that Congress did indeed intend to adopt the broad definition of power claimed by the Corps. Further, Stevens noted that no serious constitutional problem was presented inasmuch as the strong causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds, such as funds spent on bird watching, was not attenuated, but direct.\(^\text{46}\)

*Solid Waste Agency* provides a good reminder that in each Commerce Clause case the first issue is whether (1) the congressional statute actually was intended to reach the conduct at issue in the case. Once it is determined that the statute does apply, then the two constitutional questions apply of whether the activity is (2) “commerce” and (3) “among the states.” In determining this, (4) congressional findings, particularly if the case involves proving substantial affects, will be useful.

With regard to noneconomic activity, the impact of *Lopez* and *Morrison* is more profound. *Lopez* and *Morrison* make clear that the Court will not grant to Congress under the Commerce Clause plenary legislative power to regulate on any social matter that Congress may wish to regulate. For noneconomic regulation, Congress must find its constitutional grant of power in some other clause of the Constitution. Thus, for example, federal hate crimes laws, or laws making it an independent crime to do violence to a fetus, such as the Unborn Victims of Violence Act of 2004 (UVVA), would

\(^{46}\) Id. at 693-96 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). See generally William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831 (2001), discussing, *inter alia*, *Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The Court returned to the Clean Water Act in *Rapanos v. United States*. In *Rapanos*, Justice Scalia, joined by Chief Justice Roberts, and Justices Thomas and Alito, held that the phrases “the waters of the United States” and “navigable waters” in the Clean Water Act should be given a literal meaning to “connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.” Reflecting a natural law focus on purpose, Justice Kennedy indicated in his concurrence, that the term “navigable waters” should refer to any body of water with a “substantial nexus” to a continuously present, fixed body of water, since the purpose of the Clean Water Act was to permit federal regulation of any body of water that could affect the navigable waters of the United States. Reflecting the liberal predisposition to uphold grants of federal power, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, in dissent, indicated their view that “any nexus” should be sufficient for federal regulation. Under that approach, which was implicit in an instrumentalist-era case, *United States v. Riverside Bayview Homes, Inc.*, if any “hydrological connection,” even a single drop of water, can be traced from its source to a navigable waterway, the Corps has jurisdiction. 126 S. Ct. 2208, 2220-25 (2006); id. at 2247-50 (Kennedy, J., concurring in the judgment); id. at 2252-53 (Stevens, joined by Souter, Ginsburg & Breyer, JJ., dissenting), *citing* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-33 (1985).
need to be authorized under some provision of the Constitution other than the Commerce Clause. This may be difficult, both for hate crimes statutes, but also for the UVVA, since the jurisdictional hook for many of the crimes covered by the UVVA depend on the person attacked being a federal employee, or serving in a federal role, or being a foreign official serving in the United States, which could be true of the pregnant woman being harmed, but not true for the fetus. Provisions of the UVVA based on federal control over events on federal property could more easily be upheld. \footnote{See generally John S. Baker, Jr., \textit{United States v. Morrison and Other Arguments Against Federal \textquotedblleft Hate Crimes\textquotedblright\ Legislation}, 80 B.U.L. Rev. 1191, 1215-25 (2000) (questioning constitutionality of federal hate crimes legislation); 18 U.S.C. § 1841(b) (UVVA statute).}

The overall result of \textit{Lopez} and \textit{Morrison} seems consistent with the text and structure of Article I, § 8, which does seem to indicate that congressional power under the Commerce Clause must have some connection to economic activity. Thus, congressional power over purely non-economic kind of activities must be found in other of the enumerated provisions in Article I.

As noted at § 5.4 nn. 69-70, a limitation on the term “regulate” in the Commerce Clause was stated in 2012 in \textit{National Federation of Independent Business v. Sebelius}, where a 5-Justice majority held that the individual mandate provision of the Affordable Care Act of 2010 (ACA), which requires individuals to purchase health insurance by 2014 or pay a penalty by being denied part of an otherwise due tax refund, was not a “regulation” of commerce, but rather “mandating” commerce. As addressed at § 7.1.1 nn.7-12, a different 5-Justice majority nevertheless upheld the individual mandate provision of the ACA in \textit{Sebelius}, excerpted at § 7.1.1, as an exercise of the Taxing power.

A Circuit split over whether the power over “foreign commerce” in the “Foreign Commerce Clause” is broader than “domestic commerce,” or whether \textit{United States v. Lopez}’s 3 categories of Commerce Clause power applies to “foreign commerce,” continued in \textit{United States v. Bollinger}, 798 F.3d 201, 215-16 (4th Cir. 2015) (United States can convict a U.S. citizen who molested young girls while living in Haiti as the acts “demonstrably effect” the foreign commercial sex industry, without regard to whether that effect was “substantial,” as required by \textit{Lopez}; broader viewed adopted by Fourth and Ninth Circuits; \textit{Lopez} seems to apply in the Third, Sixth, and D.C. Circuits).

§ 7.1 Congressional Power Under the Taxing Clause

The Basic Doctrine

Article I, § 8, cl.1 states, “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.” This grants Congress a broad power to tax. The Supreme Court has always held Congress has the power to tax generally, and is not limited to taxing to advance other congressional powers in Article I, § 8. In such decisions, the Court has adopted the views of Hamilton and Story, noted at § 5.1 n.6, that the General Welfare Clause is part of a general grant of power to tax and spend.

If a law appears to be a tax, does not act or treat the subject as criminal, and produces some revenue, the law is a tax even though it has a regulatory effect or discourages the activities taxed. Indeed, even the Uniformity Clause in § 8, cl. 1, which provides that “all Duties, Imposts, and Excises shall be uniform throughout the United States,” has been held not to bar Congress from dealing with geographically isolated problems by using geographically neutral factors, such as the high cost of extracting oil in Alaska, which justified an exemption of such oil from a windfall profits tax. Laws regarding punishment for income tax evasion are constitutional as a “necessary and proper” means to make effective the taxing power.

During the formalist era, the Court applied a more literal approach to the taxing power and held that a tax would be invalid if it were intended to have (1) a coercive effect of regulating an area over which (2) Congress did not have regulatory power. Thus, in 1922, in the Child Labor Tax Case, excerpted below, the Court invalidated a 10% tax on goods produced by child labor because the tax

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was a coercive attempt to regulate child labor indirectly, and thus evade the Supreme Court’s 1918 decision in *Hammer v. Dagenhart* that Congress did not have the power to regulate child labor conditions at manufacturing plants. Reflecting the moderate formalism that characterized a majority during the formalist era, the Court said regarding element (1) of the test stated above that a tax must truly be “coercive” or a “penalty” before it would be held unconstitutional. The Court noted that every tax will create some incentives for parties not to engage in the taxed behavior, and that such “incidental restraint and regulation which a tax must inevitably involve” is constitutional. As part of the shift from the formalist era to the Holmesian deference-to-government era, Justice Stone noted in 1937 in *Sonzinski v. United States* that it is beyond judicial competence to inquire into the "hidden motives" of Congress to determine whether a tax is an attempt to exercise forbidden regulatory power, and thus that aspect of the tax must appear on the face of the tax itself.

Since 1937 Congress has been granted broad regulatory power over economic activity that substantially affects interstate commerce, as addressed at §§ 6.2 - 6.4 Thus, regarding element (2) of the test stated above, there are few areas today where the Child Labor Tax Case reasoning could apply. If Congress has the power to regulate, and thus the power to ban the activity entirely, Congress has the power to tax the activity however Congress sees fit.

The formalist-era Court held in 1895 in *Pollack v. Farmers’ Loan & Trust Co.* that a generic income tax was unconstitutional as violating Article I, § 9, cl. 4, which provides, “No Capitation, or other direct, tax shall be laid, unless in direct Proportion to the Census or Enumeration herein before directed to be taken.” Based on literal text and specific historical intent, five members of the Court (Chief Justice Fuller, and Justices Brewer, Field, Gray, and Shiras) held that an income tax was a “direct tax” to which the “Census and Enumeration” Clause applied. Since an income tax is not based proportionately on population, but merely on income of individuals, such a tax was held to be unconstitutional. Four Justices in dissent, looking more to arguments of purpose, general historical evidence, legislative and executive practice, and judicial precedents (as would moderate formalists, or Holmesians, as for Justice Harlan), concluded that an income tax was not such a “direct tax.” In his dissent, Justice Brown noted that were the case to be decided based on literal text alone, he might vote with the majority, but the other sources of interpretation counseled for him a different result. In his dissent, Justice Jackson, rejecting a conclusion based on literal text, specifically referred to arguments of purpose, stating that “we cannot attribute to the framers of the constitution an intention to make any tax a direct tax which it was impossible to apportion.” Bowing to the practical needs of government financing, the decision in *Pollack* was overturned in 1913 by the 16th Amendment to the Constitution, which provides: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”

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6 158 U.S. 601, 617-28 (1895); *id.* at 638-60 (Harlan, J., dissenting); *id.* at 686-95 (Brown, J., dissenting); *id.* at 696-705 (Jackson, J., dissenting); *id.* at 706-15 (White, J., dissenting).
In *National Federation of Independent Business v. Sebelius*, excerpted below, Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan, voted together to uphold the constitutionality of the individual mandate provision of the Patient Protection and Affordable Care Act of 2010 (Obamacare). As addressed at the end of § 6.4 nn.48-49, the four liberal instrumentalists would have upheld the mandate provision, which requires individuals to purchase health insurance by 2014 or pay a penalty, under the Commerce Clause. In contrast, Chief Justice Roberts, in a viewed shared by the other four Justices on the Court, concluded the mandate was not a “regulation” of commerce, but rather “mandating” commerce, since it required individuals to purchase insurance. Reflecting his Holmesian deference-to-government predisposition, however, Chief Justice Roberts then adopted the Holmesian judicial restraint maxim stated in *Ashwander v. Tennessee Valley Authority*, excerpted at § 2.3.3 n.70, that “[w]hen the validity of an act of Congress is drawn in question, [the Court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Applying that maxim, Chief Justice Roberts concluded that the mandate could be viewed as a tax on individuals who do not have health insurance, since “functionally” the provision operates as a tax, is collected by the IRS, and the amount of the payment varies depending on a person’s income, just like a tax. In concluding that the individual mandate was a tax, Chief Justice Roberts noted that the Court is not bound by what Congress calls a piece of legislation, but rather by its actual effect. Even Justice Scalia had acknowledged that principle in *Clinton v. City of New York*, excerpted at § 9.4, when he concluded that the Line-Item Veto Act was not an unconstitutional Line-Item Veto, but rather an impoundment provision, because it operated as an impoundment despite the terminology Congress used in the Act.

A four-Justice dissent rejected viewing the mandate as a tax, because, from an analytical perspective, it was imposed as a penalty for not procuring insurance, and was called that by Congress in passing the Act. For Justices who are more analytically minded, as are formalist (Scalia, Thomas & Alito) and natural law (Kennedy) Justices, such analytic considerations are more important. For functionalists, like Holmesian (Roberts) and instrumentalist (Ginsburg, Breyer, Sotomayor, and Kagan) Justices, the functional aspect of a law is more critical. The tendencies of these Justices to be analytical or functional is addressed at § 1.1.2, Table 3.

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7 132 S. Ct. 2566, 2586-93 (2012) (Roberts, C.J., announced the judgment of the Court); *id.* at 2609 (Ginsburg, J., joined by Sotomayor, J., and by Breyer & Kagan, JJ., on individual mandate).


9 132 S. Ct. at 2593-96.

10 *Id.* at 2594-95 (Roberts, C.J. opinion).


12 *Id.* at 2651-52 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
Chief Justice TAFT delivered the opinion of the Court.

This case presents the question of the constitutional validity of the Child Labor Tax Law.

The law is attacked on the ground that it is a regulation of the employment of child labor in the states – an exclusively state function under the federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by section 8, article 1, of the federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienter is associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance
onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us cannot be distinguished from that of *Hammer v. Dagenhart*, 247 U.S. 251 [(1918)]. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said: “In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority.”

In the case at the bar, Congress in the name of a tax which on the face of the act is penalty seeks to do the same thing, and the effort must be equally futile.

So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution.

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**National Federation of Independent Business v. Sebelius**

132 S. Ct. 2566 (2012)

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, and III-C, in which Justice GINSBURG, Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join.

III

B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to “lay and collect Taxes.” Art. I, § 8, cl. 1.

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals “shall” maintain health insurance. 26 U.S.C. § 5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the
Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute – that it only imposes a tax on those without insurance – is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. See § 5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition – not owning health insurance – that triggers a tax – the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a “fairly possible” one. Crowell v. Benson, 285 U.S. 22, 62 (1932). As we have explained, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” Hooper v. California, 155 U.S. 648, 657 (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns. 26 U.S.C. § 5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. § 5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§ 5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which – as we previously explained – must assess and collect it “in the same manner as taxes.” Supra, at 2583-2584. This process yields the essential feature of any tax: it produces at least some revenue for the Government. United States v. Kahriger, 345 U.S. 22, 28, n 4 (1953). Indeed, the payment is expected to raise about $4 billion per year by 2017. Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (Apr. 30, 2010), in Selected CBO Publications Related to Health Care Legislation, 2009-2010, p. 71 (rev. 2010).

It is of course true that the Act describes the payment as a “penalty,” not a “tax.” . . . That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.

[We have] held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the License Tax Cases, for example, we held that federal licenses to sell liquor and lottery tickets – for which the licensee had to pay a fee – could be sustained as exercises of the taxing power.
power. 5 Wall., at 471. And in New York v. United States we upheld as a tax a “surcharge” on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. 505 U.S., at 171. We thus ask whether the shared responsibility payment falls within Congress's taxing power, “[d]isregarding the designation of the exaction, and viewing its substance and application.” United States v. Constantine, 296 U.S. 287, 294 (1935); cf. Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992) (“[M]agic words or labels” should not “disable an otherwise constitutional levy” (internal quotation marks omitted)); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941) (“In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it” (internal quotation marks omitted)); United States v. Sotelo, 436 U.S. 268, 275 (1978) (“That the funds due are referred to as a ‘penalty’ . . . does not alter their essential character as taxes”.

For example, in Drexel Furniture [Child Labor Tax Case], we focused on three practical characteristics of the so-called tax on employing child laborers that convinced us the “tax” was actually a penalty. First, the tax imposed an exceedingly heavy burden – 10 percent of a company's net income – on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this “tax” was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue. 259 U.S., at 36-37; see also, e.g., Kurth Ranch, 511 U.S., at 780-782 (considering, inter alia, the amount of the exaction, and the fact that it was imposed for violation of a separate criminal law).

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the “prohibitory” financial punishment in Drexel Furniture. 259 U.S., at 37. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation – except that the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. See § 5000A(g)(2). The reasons the Court in Drexel Furniture held that what was called a “tax” there was a penalty support the conclusion that what is called a “penalty” here may be viewed as a tax.

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, § 9, clause 4. That clause provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” This requirement means that any “direct Tax” must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.
Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also
known as a “head tax” or a “poll tax”), might be a direct tax. See Springer v. United States, 102 U.S.
586, 596-598 (1881). Soon after the framing, Congress passed a tax on ownership of carriages, over
James Madison's objection that it was an unapportioned direct tax. Id., at 597. This Court upheld the
tax, in part reasoning that apportioning such a tax would make little sense, because it would have
required taxing carriage owners at dramatically different rates depending on how many carriages
were in their home State. See Hylton v. United States, 3 Dall. 171, 174 (1796) (opinion of Chase,
J.). The Court was unanimous, and those Justices who wrote opinions either directly asserted or
strongly suggested that only two forms of taxation were direct: capitations and land taxes. See id.,
at 175; id., at 177 (opinion of Paterson, J.); id., at 183 (opinion of Iredell, J.).

That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we
explained that “direct taxes, within the meaning of the Constitution, are only capitation taxes, as
expressed in that instrument, and taxes on real estate.” Springer, supra, at 602. In 1895, we expanded
our interpretation to include taxes on personal property and income from personal property, in the
course of striking down aspects of the federal income tax. Pollock v. Farmers' Loan & Trust Co., 158
U.S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we
continued to consider taxes on personal property to be direct taxes. See Eisner v. Macomber, 252

A tax on going without health insurance does not fall within any recognized category of direct tax.
It is not a capitation. Capitations are taxes paid by every person, “without regard to property,
profession, or any other circumstance.” Hylton, supra, at 175 (opinion of Chase, J.) (emphasis
altered). The whole point of the shared responsibility payment is that it is triggered by specific
circumstances – earning a certain amount of income but not obtaining health insurance. The payment
is also plainly not a tax on the ownership of land or personal property. The shared responsibility
payment is thus not a direct tax that must be apportioned among the several States.

There may, however, be a more fundamental objection to a tax on those who lack health insurance.
Even if only a tax, the payment under § 5000A(b) remains a burden that the Federal Government
imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as
authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly
troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the
Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation,
after all, is a tax that everyone must pay simply for existing, and capitations are expressly
contemplated by the Constitution. The Court today holds that our Constitution protects us from
federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But
from its creation, the Constitution has made no such promise with respect to taxes. See Letter from
Benjamin Franklin to M. Le Roy (Nov. 13, 1789) (“Our new Constitution is now established . . . but
in this world nothing can be said to be certain, except death and taxes”).
Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. See, e.g., United States v. Butler, 297 U.S. 1 (1936); Drexel Furniture, 259 U.S. 20. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. See Kahriger, 345 U.S., at 27-31 (collecting cases). We have nonetheless maintained that “‘there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.’” Kurth Ranch, 511 U.S., at 779 (quoting Drexel Furniture, supra, at 38).

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the “‘power to tax is not the power to destroy while this Court sits.’” Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 364 (1949) (quoting Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation – especially taxation motivated by a regulatory purpose – can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

Justice SCALIA, Justice KENNEDY, Justice THOMAS, and Justice ALITO, dissenting.

The issue is not whether Congress had the power to frame the minimum-coverage provision as a tax, but whether it did so.
In answering that question we must, if “fairly possible,” Crowell v. Benson, 285 U.S. 22, 62 (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional (ut res magis valeat quam pereat). But we cannot rewrite the statute to be what it is not. “[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .” or judicially rewriting it.” Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964), in turn quoting Scales v. United States, 367 U.S. 203, 211 (1961)). In this case, there is simply no way, “without doing violence to the fair meaning of the words used,” Grenada County Supervisors v. Brogden, 112 U.S. 261, 269 (1884), to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: “ ‘[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.’ ” United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996) (quoting United States v. La Franca, 282 U.S. 568, 572 (1931)). In a few cases, this Court has held that a “tax” imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held – never – that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that any exaction imposed for violation of the law is an exercise of Congress' taxing power – even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act “adopt[s] the criteria of wrongdoing” and then imposes a monetary penalty as the “principal consequence on those who transgress its standard,” it creates a regulatory penalty, not a tax. Child Labor Tax Case, 259 U.S. 20, 38 (1922).

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty – such as “license” (License Tax Cases, 5 Wall. 462 (1867)) or “surcharge” (New York v. United States, supra.). But we have never – never – treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a “penalty.” Eighteen times in § 5000A itself and elsewhere throughout the Act, Congress called the exaction in § 5000A(b) a “penalty.”

That § 5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate – a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of “applicable individual” subject to the minimum coverage requirement: Those with religious objections or who participate in a “health care sharing ministry,” § 5000A(d)(2); those who are “not lawfully present” in the United States, § 5000A(d)(3); and those who are incarcerated, § 5000A(d)(4). Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: Those who cannot afford coverage, § 5000A(e)(1); who earn too little income to
require filing a tax return, § 5000A(e)(2); who are members of an Indian tribe, § 5000A(e)(3); who experience only short gaps in coverage, § 5000A(e)(4); and who, in the judgment of the Secretary of Health and Human Services, “have suffered a hardship with respect to the capability to obtain coverage,” § 5000A(e)(5). If § 5000A were a tax, these two classes of exemption would make no sense; there being no requirement, all the exemptions would attach to the penalty (renamed tax) alone.

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that “neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation,” Petitioners' Minimum Coverage Brief 61, and that “[i]f [those subject to the Act] pay the tax penalty, they're in compliance with the law,” Tr. of Oral Arg. 50 (Mar. 26, 2012). These self-serving litigating positions are entitled to no weight. What counts is what the statute says, and that is entirely clear.

To say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 “defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.” United States v. Munoz-Flores, 495 U.S. 385, 395 (1990). We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H.R. 3962, 111th Cong., 1st Sess., § 501 (2009); America's Healthy Future Act of 2009, S. 1796, 111th Cong., 1st Sess., § 1301. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question – perhaps because, until today, no federal court has accepted the implausible argument that § 5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. Petitioners' Minimum Coverage Reply Brief 25. At oral argument, the most prolonged statement about the issue was just over 50 words. Tr. of Oral Arg. 79 (Mar. 27, 2012). One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.
Although referenced in Chief Justice Roberts opinion above, it is useful to note that, under the Affordable Care Act, the Internal Revenue Service is prevented from using its normal enforcement powers to collect the tax due for failure to obtain insurance: criminal indictments for nonpayment, including the possibility of jail time, penalties with respect to untimely payment, or liens on property to collect taxes dues. The only remedy for the government is to deduct the penalty amount from any refund check to which the person would normally be entitled. If the penalty is greater than the refund amount, the government can take the penalty out of the next year’s withholding payments.

An additional issue in National Federation of Independent Business was whether the individual mandate was a tax for purposes of the Anti-Injunction Act. If the individual mandate had been viewed as a tax under the Anti-Injunction Act, the challengers would have had to wait until after they paid the tax to challenge the constitutionality of the regulation. For statutory interpretation purposes, the Court is bound by congressional intent, which is why the individual mandate was not viewed as a tax for purposes of interpreting the Anti-Injunction Act. As Chief Justice Roberts stated, “It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether the exaction is within Congress’s constitutional power to tax.”

Another statutory issue under the Affordable Care Act turned out to be whether the provision for federal subsidies to low-income individuals buying mandated insurance on an insurance exchange “established by the State” also included subsidies for individuals buying insurance on the “federal exchange” available to individuals in states where the State did not establish their own exchanges. Consistent with the purpose of the ACA to provide affordable health care, a 6-3 Court held in King v. Burwell that the Act did provide for subsidies to all individuals in every state.

2. Doctrine of Intergovernmental Tax Immunities

A. Federal Immunity from State Taxation

It has been clear since McCulloch v. Maryland, decided in 1819, that states may not directly tax the federal government or any of its instrumentalities. The Court has said in a number of cases that

13 See 132 S. Ct. at 2596 (Roberts, C.J., for the Court), citing 26 U.S.C.A. § 5000A(g)(2).

14 Id. at 2582-83.

15 Id. at 2594. As Chief Justice Roberts noted in his opinion above, “The ‘question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’”Id. at 2598, citing Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948).


17 17 U.S. (4 Wheat.) 316 (1819) (state attempt to tax a branch of the Second National Bank).
activities of the United States remain free from state taxation or regulation unless Congress consents by declaring that its instrumentalities or property are subject to state regulation.\textsuperscript{18} For many decades the Court expanded \textit{McCulloch} by holding that states could not tax income from working for or contracting with the United States because that might increase the cost of federal functions.\textsuperscript{19}

In 1939, however, the Holmesian Court abandoned in \textit{Graves v. New York}\textsuperscript{20} the long-held theory that a tax on income was a tax on its source and, deferring to legislative judgments, held that states could tax the income of federal employees. The Court said that states could tax subjects that fell within the general application of non-discriminatory laws where no direct burden is laid on a federal instrumentality and there is only a remote influence on the exercise of government functions. Thus, states can now tax private parties with whom the United States does business unless the private party cannot realistically be viewed as a separate entity insofar as the activity being taxed is concerned.\textsuperscript{21} However, the Court has invalidated as discriminatory a state tax on retirement income which exempted retirement benefits paid by the state and its political subdivisions. Adopting a functional approach, the Court said this favored retired state and local employees over retired federal employees and, thus, discriminated against persons who had dealt with the federal government.\textsuperscript{22}

\textbf{B. State Immunity from Federal Taxation}

During the formalist era, the Court held in \textit{Pollack v. Farmer’s Loan}\textsuperscript{23} that any interest earned on a state bond was immune from federal taxation because it was a direct tax on the state and, thus, in

\begin{itemize}
    \item \textsuperscript{18} Van Brocklin v. Anderson, 117 U.S. 151 (1886) (Congress may permit taxation of federal property or authorize payments in lieu of taxation); Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956) (states may not bar unlicensed contractors from dealing with the federal government where federal law has its own criteria for identifying the lowest responsible bidder); Hancock v. Train, 426 U.S. 167 (1976) (no consent that state air pollution laws could apply to United States facilities).
    
    
    
    \item \textsuperscript{21} United States v. New Mexico, 455 U.S. 720 (1982) (upholding a state tax on gross income that a private contractor, a manager of government property, received from the federal government, even though title for goods purchased passed directly from the vendor to the federal government).
    
    
    \item \textsuperscript{23} 157 U.S. 429 (1895).
\end{itemize}
violation of the 10th Amendment. Similarly, the Court had earlier held that the United States could not tax the income of a state employee on income earned from the state.24

In deciding these cases, the Court would hold that while the federal government could not tax state “governmental” activities, it could tax “proprietary” activities. The attempt to distinguish between “governmental” and “proprietary” functions, however, proved elusive. As noted by Justice Blackmun in Garcia v. San Antonio Metropolitan Transit Authority:

To say that the distinction between "governmental" and "proprietary" proved to be stable, however, would be something of an overstatement. In 1911, for example, the Court declared that the provision of a municipal water supply "is no part of the essential governmental functions of a State." Flint v. Stone Tracy Co., 220 U.S. 107, 172. Twenty-six years later, without any intervening change in the applicable legal standards, the Court simply rejected its earlier position and decided that the provision of a municipal water supply was immune from federal taxation as an essential governmental function, even though municipal waterworks long had been operated for profit by private industry. Brush v. Commissioner, 300 U.S., at 370-373. At the same time that the Court was holding a municipal water supply to be immune from federal taxes, it had held that a state-run commuter rail system was not immune. Helvering v. Powers, 293 U.S. 214 (1934). Justice Black, in Helvering v. Gerhardt, 304 U.S. 405, 427 (1938), was moved to observe: "An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the 'essential' and 'non-essential' test" (concurring opinion). It was this uncertainty and instability that led the Court shortly thereafter, in New York v. United States, 326 U.S. 572 (1946), unanimously to conclude that the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned.25

In 1939, deferring to legislative judgments and adopting a functional approach, the Court held in Graves v. New York that the theory was no longer tenable that a tax on income is legally a tax on its source.26 After Graves, the Court gradually overruled the cases which immunized from federal taxation all income earned by dealings with a state. Today, Congress can tax state activities that earn revenue if it also lays a tax on similar private activities.27


In 1988, in *South Carolina v. Baker*,\(^{28}\) the Court overruled specifically the doctrine of *Pollack* that state bond interest is immune from a nondiscriminatory federal tax. Justice O'Connor, dissenting in *South Carolina v. Baker*, said that the Court had failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that are found in the 10th Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution. In reply, Justice Brennan pointed out that the state had not alleged that it was deprived of any right to participate in the political process or that it was singled out in a way that left it politically isolated and powerless.

§ 7.2 Congressional Power Under the Spending Clause

1. The Basic Doctrine

During the formalist era, in 1936, the Court held in *United States v. Butler*\(^{29}\) that Congress could not raise and spend money in order to regulate indirectly any activity that it could not regulate directly. Like the similar formalist-era approach to the taxing power, only coercive uses of the spending power, and not incidental incentives created by spending, were unconstitutional. Like the formalist-era tax doctrine, this view has been limited in cases decided since 1937.

The first step in moving away from *Butler* occurred in 1937 in *Charles C. Steward Machine Co. v. Davis*.\(^{30}\) There, a 5-4 Court, narrowly limited *Butler*, and upheld an employer tax used to fund unemployment compensation schemes, with a 90% tax credit for funds contributed to a qualified state unemployment program. The Court said that spending money to relieve unemployment during the Great Depression promoted the general welfare. Rebating the tax only to "qualified" state programs created an incentive for state enactment of such programs, and was not coercive.

The second step was taken in *Helvering v. Davis*,\(^{31}\) also decided in 1937. In *Helvering*, the Court upheld paying old age benefits under the General Welfare Clause. The Court said that when money is spent to promote the general welfare, the concept of welfare or its opposite is shaped by Congress. If the concept is not arbitrary, the states must yield. The Court went further in 1976 in *Buckley v.*

\(^{28}\) 485 U.S. 505, 512-13, 516-26 (1988) (Brennan, J., opinion for the Court); id. at 530 (O’Connor, J., dissenting). Three concurring opinions left open the possibility that there could be some federalism restriction on a federal tax scheme which undercut the ability of state or local governments to raise revenue. Id. at 527-28 (Stevens, J., concurring); id. at 528 (Scalia, J., concurring in part and concurring in the judgment); id. at 528-30 (Rehnquist, C.J., concurring in the judgment).

\(^{29}\) 297 U.S. 1, 72-78 (1936).

\(^{30}\) 301 U.S. 548, 592-98 (1937).

\(^{31}\) 301 U.S. 619, 640-45 (1937).
Valeo\textsuperscript{32} saying it is for Congress to decide which expenditures will promote the public welfare and "[a]ny limitations on the exercise of that granted power must be found elsewhere in the Constitution." In these decisions, the Court adopted the views of Hamilton and Story, noted at § 5.1 n.6, that the General Welfare Clause is part of a general grant of power to tax and spend.

When combined with the Necessary and Proper Clause, the Spending Clause also provides the constitutional basis for federal laws dealing with bribery in the administration of a federal program. As the Court noted in \textit{Sabri v. United States},\textsuperscript{33} federal laws regarding bribery, such as 18 U.S.C. § 666, do not need to require that the bribe come from federal funds to be constitutional, only that the bribe take place in the context of a federal program, so that the federal law is connected to proper implementation of a program involving federal funds.

\textit{Sabri v. United States}

541 U.S. 600 (2004)

Justice SOUTER delivered the opinion of the Court.

The question is whether 18 U.S.C. § 666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution. We hold that it is.


Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power 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 delict about demanding value for dollars. See generally McCulloch v. Maryland, 4 Wheat. 316 (1819) (establishing review for means-ends rationality under the Necessary and Proper Clause). See also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276 (1981) (same); Hanna v. Plumer, 380 U.S. 460, 472 (1965) (same). Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity. See, e.g., McCulloch, supra, at 417 (power to “establish post-offices and

\textsuperscript{32} 424 U.S. 1, 91 (1976).

post-roads” entails authority to “punish those who steal letters”). Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars.

It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant. Cf. Salinas v. United States, 522 U.S. 52, 56-57 (1997) (The “expansive, unqualified” language of the statute “does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B)”). But this possibility portends no enforcement beyond the scope of federal interest, for the reason that 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. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers. See Westfall v. United States, 274 U.S. 256, 259 (1927) (majority opinion by Holmes, J.) (upholding federal law criminalizing fraud on a state bank member of federal system, even where federal funds not directly implicated). It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here.

For those of us who accept help from legislative history, it is worth noting that the legislative record confirms that § 666(a)(2) is an instance of necessary and proper legislation. The design was generally to “protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery,” see S. Rep. No. 98-225, p. 370 (1983), in contrast to prior federal law affording only two limited opportunities to prosecute such threats to the federal interest: 18 U.S.C. § 641, the federal theft statute, and § 201, the federal bribery law. Those laws had proven inadequate to the task. The former went only to outright theft of unadulterated federal funds, and prior to this Court's opinion in Dixson v. United States, 465 U.S. 482 (1984), which came after passage of § 666, the bribery statute had been interpreted by lower courts to bar prosecution of bribes directed at state and local officials. See, e.g., United States v. Del Toro, 513 F.2d 656, 661-663 (C.A.2 1975) (overturning federal bribery conviction); see generally Salinas, 522 U.S., at 58-59 (recounting the limitations of the pre-existing statutory framework). Thus we said that § 666 “was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds,” id., at 58, thereby filling the regulatory gaps. Congress's decision to enact § 666 only after other legislation had failed to protect federal interests is further indication that it was acting within the ambit of the Necessary and Proper Clause.
2. **Indirect Regulation of States by Conditions in Federal Spending Programs**

As the Court noted in *Fullilove v. Klutznick*, 34 “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.” The only states-rights’ federalism with respect to spending are in two kinds of cases involving conditions placed by Congress on grants of money flowing to the states. The first kind of case is *Pennhurst State School & Hospital v. Halderman*. 35 In *Pennhurst*, the Court held that if Congress intends to impose a condition on the grant of federal money to the states, it must do so unambiguously so that the states voluntarily and knowingly accept the terms of the grant. The second kind of case is *South Dakota v. Dole*. 36 In *Dole*, the Court held that conditions on federal grants must be clear and unambiguous, but, if so, they are constitutional unless they are not rationally related to a federal interest in national projects, or if they create such powerful incentives that they are coercive, or if they are used to induce states to engage in unconstitutional activities.

Between 1937 and 2012, no congressional condition on spending was held to be unconstitutional. For example, in 1987 in *South Dakota v. Dole*, 37 excerpted below, the Court upheld congressional withholding of 5% of federal highway funds from any state in which the purchase or public possession of alcoholic beverages by any person under 21 was lawful. This condition put pressure on the states to outlaw drinking by persons under 21, a result that Congress could likely not achieve directly under the Commerce Clause because of the 21st Amendment. After repealing Prohibition in § 1 of the 21st Amendment, § 2 of that Amendment appears to give the states an exclusive power to bar the delivery or use of intoxicating liquors in their states, as discussed at § 14.4.4 nn.114-16. In *Dole*, Justice Rehnquist said the Court was not deciding whether the 21st Amendment would prohibit Congress from enacting a national minimum drinking age. The reason was that the conditional spending legislation was constitutional even if Congress could not directly regulate the drinking age. Congress can condition spending of funds on compliance with federal rules, subject to only a few limits on the conditional spending power. Similarly, Congress could likely condition certain highway funds on states adopting uniform standards for driver’s licenses as part of a program of national identity cards if Congress so wished.

In the No Child Left Behind Act of 2001, Congress conditioned rather large federal educational grants to the states on the states adopting a panoply of educational testing requirements. As has been noted, federal funding to support elementary and secondary education amounts to 12.8% of total

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37 *Id.* at 207-12.
federal outlays to the states, and equals 6.6% of all state expenditures on education.\textsuperscript{38} Nonetheless, if litigated, it is likely the Court would find such conditions are reasonably related to the federal interest in an educated citizenry, and do not represent a coercive use of the spending power. In a reported decision, the National Education Association and local school districts did not even challenge this aspect of the Act, but only whether the spending conditions were clear and unambiguous.\textsuperscript{39}

Some commentators have expressed concern that this broad spending power gives Congress too much power to affect matters of traditional state concern and undermines limits on federal power under the Commerce Clause, addressed at § 6.4; the 10th Amendment, addressed at § 8.1; the 11th Amendment, addressed at § 8.2; and Congress’ 14th Amendment enforcement power, addressed at § 7.4.2. However, that power is implicit in Court doctrine, and lower courts have similarly read \textit{Dole} as giving Congress virtually unreviewable power in this area.\textsuperscript{40}

In 2012, in \textit{National Federation of Independent Business v. Sebelius},\textsuperscript{41} excerpted below, the Court was confronted with whether under the Patient Protection and Affordable Care Act of 2010 (Obamacare), the ability of the federal government to deny a state all Medicaid funding if a state chose not to join in Medicaid expansion constituted an unconstitutional coercive condition on spending. Medicaid has long been the largest federal program of grants to the states. In 2010, the Federal Government directed more than $552 billion in federal funds to the states, of which more than $233 billion, or 42%, went to pre-expansion Medicaid. Contrast that with the 12.8% of federal funding going to education which was at risk in the No Child Left Behind Act. Although no previous spending condition had been held coercive in the post-1937, New Deal era, seven Justices held that threatening to remove all Medicaid funding was a coercive threat, as it might involve 10%-40% of a state’s budget, depending on the state, and averaging 22% of state budgets generally.\textsuperscript{42}

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\textsuperscript{41} 132 S. Ct. 2566, 2663 (2012).

\textsuperscript{42} \textit{Id.} at 2575, 2607 (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV); \textit{id.} at 2662-66 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Only Justices Ginsburg and Sotomayor disagreed. \textit{Id.} at 2641-42 (Ginsburg, J., joined by Sotomayor, J., as to Part V).
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A different 5-Justice majority of Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan concluded that the threat to remove all funding could be severed from the Act, and the rest of the Act remain.\textsuperscript{43} The 4-Justice joint dissent would have held that this threat rendered the entire Medicaid expansion unconstitutional. That conclusion was easier for the joint dissent because of their view that the individual mandate was also unconstitutional, and thus trying to sever out both the individual mandate and the Medicaid expansion threat would have left the statute more of a mere shell. Thus, they ruled the entire Affordable Care Act unconstitutional.\textsuperscript{44} Once the mandate provision is constitutional under the Taxing power, discussed at § 7.1 nn.7-12, and excerpted at § 7.1.1, the majority’s analysis is consistent with the Court’s usual practice to sever out provisions if possible.

Under the Act, the federal government will pick up 100% of the costs of Medicaid expansion in the first three years, declining to 90% of the costs after that.\textsuperscript{45} Under the majority’s analysis in National Federation of Independent Business, states will be able to make the decision whether to participate in Medicaid expansion without having to worry that their existing Medicaid funds might be terminated if they do not participate. The decision will also likely increase the number of cases where states will challenge other federal government conditions as being coercive.\textsuperscript{46}

It remains to be seen whether any such challenges will be successful, or will the Court view the massive spending threat regarding Medicaid funding as \textit{sui generis}.\textsuperscript{47} We do know that no court has ever held that the threat in the No Child Left Behind Act to remove federal support for education

\textsuperscript{43} Id. at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV); id. at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V). \textit{See generally INS v. Chadha}, 462 U.S. 919, 931-34 (1983) (unconstitutional legislative veto provision in \textit{Chadha}, and by analogy 200-plus other statutes with legislative veto provisions, severable, while rest of delegated power constitutional).

\textsuperscript{44} Id. at 2668-71 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (Medicaid expansion unconstitutional); id. at 2671-77 (entire Affordable Care Act unconstitutional).

\textsuperscript{45} The precise figures are the federal government will pay all of the costs of expanding Medicaid under the reform until 2016, 95% in 2017, 94% in 2018, 93% in 2019, and 90% thereafter. \textit{See Health Care and Education Reconciliation Act of 2010}, Section 1201 (Federal funding for States), Pub.-L 111-152, 124 Stat. 1029 (March 30, 2010).

\textsuperscript{46} \textit{See, e.g., Houston Chronicle, Health care ruling cited in air appeal,} B1 (August 2, 2012) (attorneys for Texas claim it is coercive for the Environmental Protection Agency to threaten Texas with construction bans on power plants, refineries, and other large industrial facilities unless Texas passes a plan to control emissions of gases linked to global warming).

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. S.D. Codified Laws § 35-6-27 (1986). In 1984 Congress enacted 23 U.S.C. § 158 (1982 ed., Supp. III), which directs the Secretary of Transportation to withhold a percentage of federal highway funds [Ed.: on the facts in this case 5%] otherwise allocable from States “in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.” The State sued in United States District Court seeking a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed. 791 F.2d 628 (1986).

The Constitution empowers Congress 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.” Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). The breadth of this power was made clear in United States v. Butler, 297 U.S. 1, 66 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined 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.” Thus, objectives not thought to be within Article I's “enumerated legislative fields,” id., at 65, 56 S.Ct., at 319, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981), but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of “the general welfare.” See Helvering v. Davis, 301 U.S. 48

See generally id. at 612-29. As the author notes, “Examination of the financial terms on No Child Left Behind should lead to the conclusion that the law does not constitute dragooning under either the plurality’s analysis or the joint dissent’s.” Id. at 621. Further, the federal government routinely waived requirements of the No Child Left Behind Act to ensure that states would not be denied funding, thus making the program even less coercive in practice. Id. at 616.

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In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Helvering v. Davis, supra, at 640, 645. [FN 2: The level of deference to the congressional decision is such that the Court has more recently questioned whether “general welfare” is a judicially enforceable restriction at all. See Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam)]. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it “must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” Pennhurst State School and Hospital v. Halderman, supra, at 17. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated “to the federal interest in particular national projects or programs.” Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion). See also Ivanhoe Irrigation Dist. v. McCracken, supra, 357 U.S., at 295 (“[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 269-270 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam); King v. Smith, 392 U.S. 309, 333, n. 34 (1968).

South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that “the concept of welfare or the opposite is shaped by Congress . . . .” Helvering v. Davis, supra, at 645. Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. See 23 U.S.C. § 158 (1982 ed., Supp. III). And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it “has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment.” Brief for Petitioner 52. Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel. See 23 U.S.C. § 101(b). This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created “an incentive to drink and drive” because “young persons commut[e] to border States where the drinking age is lower.” Presidential Commission on Drunk Driving, Final Report 11 (1983). By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

[Regarding the fourth restriction, o]ur decisions have recognized 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.” Steward Machine Co. v. Davis, supra, 301 U.S., at 590. Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that
the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago in Steward Machine Co. v. Davis: “[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.” 301 U.S., at 589-590.

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is affirmed.

Justice O'CONNOR, dissenting.

[T]he Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. Massachusetts v. United States, supra, 435 U.S., at 461; Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) (the United States may impose “reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”); Steward Machine Co. v. Davis, supra, 301 U.S. at 590 (“We do not say that a tax is valid, when imposed by act of Congress, 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”). In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways – or, conversely, that highways might become overburdened if they
had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158. Cf. Tr. of Oral Arg. 39 (counsel for the United States conceding that to condition a grant upon adoption of a unicameral legislature would violate the “germaneness” requirement).

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. [at 19-20] as Amici Curiae: “Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes…. The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.”

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Chief Justice ROBERTS announced the judgment of the Court and delivered . . . an opinion with respect to Part IV, in which Justice BREYER and Justice KAGAN join.

IV

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the “Federal Government may not compel the States to enact or administer a federal regulatory program.” New York, 505 U.S., at 188.

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals – pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U.S.C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. § 1396a(a)(10)(A)(ii). On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line. Kaiser Comm'n on Medicaid and the Uninsured, Performing Under Pressure 11, and fig. 11 (2012).

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133
percent of the federal poverty line. § 1396a(a)(10)(A)(i)(VIII). The Act also establishes a new “[e]ssential health benefits” package, which States must provide to all new Medicaid recipients – a level sufficient to satisfy a recipient's obligations under the individual mandate. §§ 1396a(k)(1), 1396u–7(b)(5), 18022(b). The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. § 1396d(y)(1).

In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. Ibid. In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately $100 billion per year, nearly 40 percent above current levels. Statement of Douglas W. Elmendorf, CBO’s Analysis of the Major Health Care Legislation Enacted in March 2010, p. 14, Table 2 (Mar. 30, 2011).

In South Dakota v. Dole, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was “directly related to one of the main purposes for which highway funds are expended – safe interstate travel.” 483 U.S., at 208. At the same time, the condition was not a restriction on how the highway funds – set aside for specific highway improvement and maintenance efforts – were to be used.

We accordingly asked whether “the financial inducement offered by Congress” was “so coercive as to pass the point at which ‘pressure turns into compulsion.’” Id., at 211 (quoting Steward Machine, supra, at 590). By “financial inducement” the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only “relatively mild encouragement to the States.” Dole, 483 U.S., at 211. We observed that “all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%” of her highway funds. Ibid. In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. See Nat. Assn. of State Budget Officers, The State Expenditure Report 59 (1987); South Dakota v. Dole, 791 F.2d 628, 630 (C.A.8 1986). In consequence, “we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power.” Dole, 483 U.S., at 212. Whether to accept the drinking age change “remain[ed] the prerogative of the States not merely in theory but in fact.” Id., at 211-212.

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement” – it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that “further payments will not be made to the State,” 42 U.S.C. § 1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely “a relatively small percentage” of its existing Medicaid funding, but all of it. Dole, supra, at 211. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. See Nat. Assn. of State Budget Officers, Fiscal Year 2010 State Expenditure Report, p. 11, Table 5 (2011); 42 U.S.C. § 1396d(b). The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of pre-expansion Medicaid. Brief for United States 10, n.6. In addition, the States have developed intricate statutory and administrative regimes over the course
of many decades to implement their objectives under existing Medicaid. It is easy to see how the Dole Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a “prerogative” to reject Congress's desired policy, “not merely in theory but in fact.” 483 U.S., at 211-212. The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold all “further [Medicaid] payments . . . to the State” if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. § 1396c. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further. That clause specifies that “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.” § 1303. Today's holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

This is not to say, as the joint dissent suggests, that we are “rewriting the Medicaid Expansion.” Instead, we determine, first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion. We then follow Congress's explicit textual instruction to leave unaffected “the remainder of the chapter, and the application of [the challenged] provision to other persons or circumstances.” § 1303. When we invalidate an application of a statute because that application is unconstitutional, we are not “rewriting” the statute; we are merely enforcing the Constitution.

The question remains whether today's holding affects other provisions of the Affordable Care Act. In considering that question, “[w]e seek to determine what Congress would have intended in light of the Court's constitutional holding.” United States v. Booker, 543 U.S. 220, 246 (2005) (internal quotation marks omitted). Our “touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.” Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 330 (2006) (internal quotation marks omitted). The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is “evident” that the answer is no, we must leave the rest of the Act intact. Champlin Refining Co. v. Corporation Comm'n of Okla., 286 U.S. 210, 234.
We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate, 26 U.S.C. § 5000A(f)(1)(A)(ii), and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain “fully operative as a law,” Champlin, supra, at 234, and will still function in a way “consistent with Congress' basic objectives in enacting the statute,” Booker, supra, at 259. Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring in part, concurring in the judgment in part, and dissenting in part.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

The Chief Justice acknowledges that Congress may “condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds,” but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in the Chief Justice's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, the Chief Justice maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first
signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. The Chief Justice therefore – for the first time ever – finds an exercise of Congress' spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim – to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as the Chief Justice charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress' spending power. Given that holding, I entirely agree with the Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible – not, as the joint dissenters would have it, to scrap the expansion altogether. The dissenters' view that the ACA must fall in its entirety is a radical departure from the Court's normal course. When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation. See, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (Court's normal course is to declare a statute invalid "to the extent that it reaches too far, but otherwise [to leave the statute] intact"). That course is plainly in order where, as in this case, Congress has expressly instructed courts to leave untouched every provision not found invalid. See 42 U.S.C. § 1303. Because the Chief Justice finds the withholding – not the granting – of federal funds incompatible with the Spending Clause, Congress' extension of Medicaid remains available to any State that affirms its willingness to participate.

Justice SCALIA, Justice KENNEDY, Justice THOMAS, and Justice ALITO, dissenting.

IV

One way in which Congress may spend to promote the general welfare is by making grants to the States. Monetary grants, so-called grants-in-aid, became more frequent during the 1930's, G. Stephens & N. Wikstrom, American Intergovernmental Relations – A Fragmented Federal Polity 83 (2007), and by 1950 they had reached $20 billion or 11.6% of state and local government expenditures from their own sources. By 1970 this number had grown to $123.7 billion or 29.1% of state and local government expenditures from their own sources. As of 2010, federal outlays to state and local governments came to over $608 billion or 37.5% of state and local government expenditures.
When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. See Barnes v. Gorman, 536 U.S. 181, 186 (2002); Pennhurst, 451 U.S., at 17. And just as a contract is voidable if coerced, “[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” Ibid. (emphasis added). If a federal spending program coerces participation the States have not “exercise[d] their choice” – let alone made an “informed choice.” Id., at 17, 25.

Coercing States to accept conditions risks the destruction of the “unique role of the States in our system.” Davis, supra, at 685 (Kennedy, J., dissenting). “[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.” New York, 505 U.S., at 162. Congress may not “simply commande[er] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” Id., at 161 (internal quotation marks and brackets omitted). Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory.

Where all Congress has done is to “encourag[e] state regulation rather than compe[l] it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.” New York, supra, at 168.

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.

The dimensions of the Medicaid program lend strong support to the petitioner States' argument that refusing to accede to the conditions set out in the ACA is not a realistic option. Before the ACA's enactment, Medicaid funded medical care for pregnant women, families with dependents, children, the blind, the elderly, and the disabled. See 42 U.S.C. § 1396a(a)(10) (2006 ed., Supp. IV). The ACA greatly expands the program's reach, making new funds available to States that agree to extend coverage to all individuals who are under age 65 and have incomes below 133% of the federal poverty line. See § 1396a(a)(10)(A)(i)(VIII). Any State that refuses to expand its Medicaid programs in this way is threatened with a severe sanction: the loss of all its federal Medicaid funds. See § 1396c (2006 ed.)

Medicaid has long been the largest federal program of grants to the States. See Brief for Respondents in No. 11-400, at 37. In 2010, the Federal Government directed more than $552 billion in federal funds to the States. See Nat. Assn. of State Budget Officers, 2010 State Expenditure Report: Examining Fiscal 2009-2011 State Spending, p. 7 (2011) (NASBO Report). Of this, more
than $233 billion went to pre-expansion Medicaid. See id., at 47. This amount equals nearly 22% of all state expenditures combined. See id., at 7.

The States devote a larger percentage of their budgets to Medicaid than to any other item. Id., at 5. Federal funds account for anywhere from 50% to 83% of each State's total Medicaid expenditures, see § 1396d(b) (2006 ed., Supp. IV); most States receive more than $1 billion in federal Medicaid funding; and a quarter receive more than $5 billion, NASBO Report 47. These federal dollars total nearly two thirds – 64.6% – of all Medicaid expenditures nationwide. Id., at 46.

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. See Part IV-A to IV-E, supra; Part IV-A (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes – in two cursory sentences at the very end of its brief – preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident. Congress assumed States would have no choice, and the ACA depends on States' having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion. Furthermore, a State's withdrawal might subject everyone in the State to much higher insurance premiums. That is because the Medicaid Expansion will no longer offset the cost to the insurance industry imposed by the ACA's insurance regulations and taxes, a point that is explained in more detail in the severability section below. To make the Medicaid Expansion optional despite the ACA's structure and design “would be to make a new law, not to enforce an old one. This is no part of our duty.” Trade-Mark Cases, 100 U.S. 82, 99 (1879).

V

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.
The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.


§ 7.3  Additional Legislative Powers in Article I, § 8

Since *McCulloch v. Maryland*, decided in 1819, it has been clear that federal instrumentalities are immune from state control in the performance of their duties. For example, in 1956, in *Leslie Miller, Inc. v. Arkansas*, the Court held that a state could not require a contractor to secure a state license before bidding on a federal job where the United States had its own specifications as to who was a responsible bidder. In *Hancock v. Train*, decided in 1976, the Court held that states cannot require federal instrumentalities to comply with state laws regarding air contamination. The Court noted that Congress can authorize state regulation of federal activities, but there must be a clear and unambiguous declaration by Congress. In this case, reflecting their more conservative Holmesian posture of deference to states, Justices Stewart and Rehnquist concluded that congressional intent to permit state enforcement of emissions regulations through a permit system was sufficiently clear to uphold the state regulatory scheme as applied to federal installations.

In 1995, the Court struck down in *U.S. Term Limits v. Thornton* state laws fixing term limits for members of Congress, whether done directly or by ballot-access procedures. Writing for the Court, Justice Stevens said the Constitution intended that neither Congress nor the states should possess the power to alter the exclusive qualifications set forth in constitutional text. This holding is consistent with the verbal maxim of *expressio unius est exclusio alterius* (expression of one thing excludes others); the Court’s holding in *Marbury v. Madison* that Congress could not add to the


52 *Id.* at 199 (Stewart, J., joined by Rehnquist, J., dissenting).

Court’s original jurisdiction, excerpted at § 1.3; and the Court’s holding in Powell v. McCormack, discussed at § 4.3.1(D) n.50, that Congress cannot add to the qualifications of members for Congress. Justice Kennedy also noted, “Nothing in the Constitution or Federalist Papers. . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives.”54

Four Justices in dissent concluded that the Constitution’s qualifications for office were merely minimum requirements. For the dissent, the principle of states’ rights ratified in the 10th Amendment meant that because the Constitution does not expressly prohibit the states from enacting term limits, it raises no bar to such action.55 The dissent was composed of the most conservative Justices on the Court, Chief Justice Rehnquist and Justices Scalia and Thomas, reflecting the conservative predisposition to defer to states, as well as Justice O’Connor, who often also strongly supported states’ rights.

Against this background regarding federal immunity from state regulation where Congress has the power to regulate, the remaining powers granted to Congress in Article I, § 8 are discussed below.

1. **Fiscal Powers**

   Under Article I, § 8, cls. 2, 4, 5 & 6, Congress has the power: “To borrow Money on the credit of the United States”; “To establish . . . 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”; and “To provide for the Punishments of counterfeiting the Securities and current Coin of the United States.” Article I, § 10, cl. 1 provides, “No State shall . . . coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.” These provisions have been interpreted to give the federal government plenary power over the subjects of revenue, finance, and currency. That power is derived from the aggregate of all these congressional powers, also including the Necessary and Proper Clause.56

2. **Naturalization & Regulation of Aliens**

   Under Article I, § 8, cl. 4, Congress is granted the power to “establish an uniform Rule of Naturalization.” Naturalization is a privilege aliens may claim only on terms imposed by Congress.57 As part of exercising this power, Congress also has the power over the immigration of aliens into the United States as a “necessary and proper” adjunct to the naturalization power, and

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54 Id. at 842 (Kennedy J., concurring).
55 Id. at 845 (Thomas, J., joined by Rehnquist, C.J., and O'Connor & Scalia, JJ., dissenting).
as a natural concomitant of powers inherent in national sovereignty.\textsuperscript{58} The Court has stated that over no other subject is Congress' power more complete.\textsuperscript{59} However, aliens are entitled to due process in the application of immigration and naturalization rules, as discussed at § 12.4.4 nn.69-72, since the Due Process Clause applies to any “person,” not only “citizens.”\textsuperscript{60} Aliens also have limited rights under the Equal Protection Clause, addressed at § 23.2.

3. **Post Office, Copyright, and Patent Powers**

Under Article I, § 8, cls. 7 & 8, Congress is granted the power “To establish Post Offices and post Roads” and “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Under these clauses, combined with the Necessary and Proper Clause, Congress can provide for criminal and civil penalties for, among other things, mail fraud, copyright infringement, and patent infringement.\textsuperscript{61} In *Eldred v. Ashcroft*,\textsuperscript{62} the Court addressed whether Congress extending to authors copyrights for 70 years after the author’s death, rather than 50 years, complied with the “limited Times” language of the Copyright Clause. The Court held that the 70-year provision was constitutional. The Court deferred greatly to the legislative and executive practice in extending copyright protection over the last 200 years, and also noted that the 70-year provision was consistent with European copyright law. Congress adopting a similar provision was thus “rationally related” to a legitimate interest in helping to create uniform copyright standards around the world. Additional cases have upheld broad congressional power under the Copyright Clause.\textsuperscript{63}

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\textsuperscript{60} Mathews v. Diaz, 426 U.S. 67, 77-80 (1976).


\textsuperscript{62} 537 U.S. 186, 199-208 (2003).

\textsuperscript{63} See, e.g., Luck’s Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005) (constitutional to restore copyright protection to foreign copyright holders whose works are protected in their country of origin, but which had fallen into the public domain in the United States); Kiss Catalog, Ltd. v. Passport Int’l Prod., Inc., 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (anti-bootlegging statute constitutional). But see United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) (anti-bootlegging statute unconstitutional as providing for “perpetual” copyright-
4. **Power Over the Federal Judicial Branch**

Under Article I, § 8, cl. 9, Congress is granted the power to “constitute Tribunals inferior to the supreme Court.” Under this provision, while the creation of a Supreme Court of the United States is required by Article III of the Constitution, Congress is granted the power to decide whether to create lower federal courts, and, for cases falling under the jurisdictional grant of the federal courts in Article III, can determine the jurisdiction of such courts based on the text in Article III to make “such Exceptions, and under such Regulations as the Congress shall make.”

5. **The Admiralty Power**

Under Article I, § 8, cl. 10, Congress has the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” This field is thus under federal control, but Congress may be restricted under this clause by traditional concepts of admiralty and maritime jurisdiction.\(^{64}\) However, modern Commerce Clause power “with foreign nations, and among the several States” would likely sustain any regulations that Congress would wish to make.

6. **Foreign Policy Powers**

These powers are discussed in Chapter 11. Under Article II, § 2, cl. 2, the President has the power, with the approval of 2/3 of the Senate present in favor, to make treaties. The Senate can thus refuse to ratifies treaties if 2/3 approval is not obtained. Under Article II, § 2, cl. 2 the President "shall appoint Ambassadors, other public ministers and Consuls" but only “with the Advice and Consent of the Senate.” Congress can influence foreign affairs with its powers in Article I, § 8, cl. 3 to “regulate commerce with foreign Nations . . . and with the Indian Tribes”; in Article I, § 8, cl. 4 to “establish an uniform Rule of Naturalization”; and in Article I, § 8, cl. 10 to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”

7. **The War Powers**

These powers are discussed in Chapter 12. They include Article I, § 8, cl. 11-16: “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 term longer 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 [today termed the state National Guards] to execute the Laws of the Union, suppress Insurrections and repel Invasions”; and “To provide for organizing, arming, and disciplining, the Militia, and for governing like protection for “unfixed” live performances – that is, performances not intended to be memorialized in a “fixed recording” – contrary to “fixation” (“Writings and Discoveries”) and “durational” (“limited Times”) requirements of the Copyright Clause).

\(^{64}\) *See, e.g.*, Detroit Trust Co. v. The Barlum, 293 U.S. 21, 42-45 (1934).
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.”

8. The Property Power

Under Article I, § 8, cl. 17, Congress is granted power to exercise “exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cessation of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States,” what became the District of Columbia, and “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.” Under Article IV, § 3, cl.2, Congress is also given the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” These clauses has been read as granting Congress plenary power over federal public lands, subject to the Bill of Rights or other constitutional limitations on government action, with the minor exception regarding non-fundamental Bill of Rights provisions recognized in The Insular Cases, discussed at § 11.3.3 n.17.

Despite this conclusion, at least one author has argued that arguments of text and specific historical intent support the view that Congress’ property power is more limited, and that the original understanding was that Congress would have the power under the Property Clause over the District of Columbia, and isolated buildings and forts necessary for federal purposes, but that other federal property, including territories, would be turned over to the states, that is “disposed of” in a timely manner, under Article IV, § 3, cl.2. The Supreme Court has never evidenced any support for this view, nor has this view been supported by federal legislative or executive practice.

As of 2004, the United States owned some land in every state, and approximately 29% of the total land in the United States, with the largest acreage being 69.1% of Alaska. The United States also owns significant parts of other states, including: Arizona, 48.1%; California, 45.3%; Colorado, 36.6%; Idaho, 50.2%; Montana, 29.9%; New Mexico, 41.8%; Nevada, 84.5%; Oregon, 53.1%; Utah, 57.4%; Washington, 30.3%; and Wyoming, 42.3%.67

65 See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976) (power over wildlife on federal lands); Banner v. United States, 428 F.3d 303, 310-12 (D.C. Cir. 2005) (Congressional ban on District of Columbia taxation of income of non-residents does not violate the Uniformity Clause of Art. I, § 8, cl. 1, because the legislation was passed as an aspect of Congress’ authority to exercise “exclusive Legislation” in the District of Columbia, and this ban was similar to what a state could do regarding state taxation of income and would not violate the Equal Protection Clause).


67 See Laurence M. Vance, This Land Is Not Your Land (internet site searched by using author’s name and words in the title) (referencing Federal Real Property Profile 2004).
§ 7.4 Congressional Powers Under the Civil War Amendments (13th, 14th, and 15th)

Each provision in the Civil War Amendments – the 13th, 14th, and 15th Amendments – has a section providing that “Congress shall have power to enforce” the amendment “by appropriate legislation.”

1. Doctrine Specific to the 13th Amendment

The 13th Amendment was first interpreted by the Supreme Court in the Slaughter-House Cases, decided in 1873. The Court said the obvious purpose of the 13th Amendment was to forbid "all shades and conditions of African slavery." Ten years later, a more extensive interpretation was given in The Civil Rights Cases. There the Court held that the Amendment nullified all state laws upholding slavery and gave Congress power to pass all laws necessary and proper to abolish all "badges and incidents of slavery." These badges and incidents, said the Court, are disabilities relating to fundamental rights that form the essence of civil freedom: the same rights as enjoyed by white citizens to make and enforce contracts, to sue, be a party, give evidence, and inherit, purchase, lease, sell and convey property. However, the Court held that Congress' power did not extend to adjusting "social rights," as by providing federal remedies for a refusal of service on racial grounds by the owner of an inn, a public conveyance, or a place of amusement.

The instrumentalist era saw substantial changes in 13th Amendment jurisprudence. These changes were based mostly on the instrumentalist Court's perception that the prior cases were wrongly decided from the perspective of instrumentalist social policy. For example, in 1968 the Court overruled prior doctrine to hold in Jones v. Alfred H. Mayer Co. that 42 U.S.C. § 1982 bars all race discrimination, private as well as public, in the sale or rental of property, and that it was within Congress' power to enforce the 13th Amendment. Dissenting in Jones, Justice Harlan said that the statute's words suggested a right to equal status under law and, thus, a right enforceable only against state-sanctioned discrimination. The Court in Jones also abandoned its apparently exclusive claim in The Civil Rights Cases to define the "badges and incidents of slavery." The Court said that Congress has the power rationally to determine what are the badges and incidents of slavery, limited only by the “appropriate” test of McCulloch v. Maryland.

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68 83 U.S. (16 Wall.) 36, 69 (1873).


71 Id. at 473-76 (Harlan, J., dissenting).

72 Id. at 443-44. See, e.g., United States v. Metcalf, 881 F.3d 641 (8th Cir. 2018) (Congressional hate crimes statute providing for up to 10 years in prison for willfully causing bodily injury based on “race, color, religion, or national origin” valid under Congress’ power to enforce the 13th Amendment as a “badge or incident” of slavery).
Building on Jones, in 1971 the Court overruled prior doctrine and held in Griffin v. Breckenridge\textsuperscript{73} that § 1985(3), an exercise of power under § 2 of the 13th Amendment, extended validly to private conspiratorial violence based on "racial, or perhaps otherwise class-based, invidious discriminatory animus." In 1976, the Court extended Jones in Runyon v. McCrary\textsuperscript{74} to § 1981 and the right to make and enforce contracts. As with race discrimination under the Equal Protection Clause, addressed at § 20.4, discriminatory effects are not enough to trigger violations of these statutes. Instead, in the absence of facial discrimination, proof of intent to discriminate is required.\textsuperscript{75}

The modern natural law Court has not reversed or limited this line of instrumentalist precedents. But neither has it used them to expand federal protections. For example, in Bray v. Alexandria Women's Health Clinic,\textsuperscript{76} the Court passed up a chance to expand the Griffin v. Breckenridge concept of recovery for a "class-based invidious discriminatory animus." Instead, the Court held that § 1985(3) did not provide a federal action for conspiracy to obstruct access to abortion clinics. The Court said that the opposition to abortion was not "class-based invidiously discriminatory animus" because it did not focus on women by reason of their sex. Given this conclusion, the Court did not need to address whether § 1985(3) is limited to “racial animus” or “perhaps otherwise class-based, invidious discriminatory animus,” as suggested in Breckenridge.

In 1987, in Saint Francis College v. Al-Khazraji,\textsuperscript{77} the Court confined § 1981 to "racial" discrimination and did not extend that section to discrimination based on national origin or religion. The Court did hold, however, that "race" is not limited by technical scientific understanding, but rather by congressional intent regarding the meaning of “race.” Given congressional understandings in the 19th century, claims for racial discrimination could thus be stated by an Arab or Jew, even though today they would be classified as part of the “Caucasian” race, given “popular understanding that there are three major human races – Caucasoid, Mongoloid, and Negroid.” The Court said, "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination because of their ancestry or ethnic characteristics," although this does not include discrimination based “solely on the place or nation of his origin.” The Court applied the same reasoning to interpret § 1982 in Shaare Tefila Congregation v. Cobb.\textsuperscript{78}

\textsuperscript{73} 403 U.S. 88, 102 (1971).


\textsuperscript{76} 506 U.S. 263, 269-74 (1993).

\textsuperscript{77} 481 U.S. 604, 610 n.4, 613 (1987).

\textsuperscript{78} 481 U.S. 615, 616-18 (1987).
The failure of the Court to cut back on some of the instrumentalist precedents reflects the natural law predisposition to follow precedent unless some special reason calls for the precedent to be overruled. For example, in 1989, the Court unanimously reaffirmed Runyon v. McCrory in Patterson v. McLean Credit Union. Justice Kennedy's opinion stressed stare decisis, saying the case had not been undermined by subsequent decisions or legislation, had not proved unworkable, and did not frustrate the objectives of Title VII of the Civil Rights Act of 1964. Focusing on whether the case represented a substantially unjust result, Justice Kennedy stated, "Whether Runyon's interpretation of Section 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, Runyon is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."

Despite following the core holding of Runyon, the Court’s opinion ultimately concluded that while § 1981's language regarding “making and enforcing” contracts bans discrimination in hiring and in promotion if the promotion would practically speaking represent an “opportunity to enter into a new contract with the employer,” its language does not apply to acts of racial harassment committed in connection with the “performance” of an employment contract. Thus, unlike the instrumentalist Justices in Runyon, who viewed complaints about racially discriminatory “performance” either as reflecting rights to non-discrimination reserved in the “making” of the contract or “enforcing” the contract for such performance, the majority refused to expand federal remedies for discrimination.

2. Doctrine Relevant to the 13th, 14th, and 15th Amendments

As with § 2 of the 13th Amendment, § 5 of the 14th Amendment and § 2 of the 15th Amendment have language stating that “Congress shall have power to enforce” the amendment “by appropriate legislation.” The two main points of contention in interpreting this language have been what the word “enforce” means, and what the word “appropriate” means. Regarding “enforce,” the question is whether Congress has the power to define for itself what action violates the Civil War Amendments and then provide remedies for that action, or is Congress limited to providing remedial schemes for violations found by the Court. Regarding “appropriate,” the question is what should be the test to determine appropriate congressional action.

Because the Civil War Amendments were ratified between 1865 and 1870, it is not surprising that there were no decisions in the natural law era on congressional enforcement power. Of course, the

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80 Id. at 175-82, 185 (majority opinion); id. at 207-15 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., concurring in the judgment in part and dissenting in part); id. at 219-22 (Stevens, J., concurring in the judgment in part and dissenting in part (discrimination in performance an aspect of different terms in “making” a contract)); id. at 206-07 (Brennan, J., joined by Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part (“enforcing” a contract).
Court had held in 1803 in Marbury v. Madison that it is a judicial function to say what the law is. This suggests that perhaps only the Court can determine violations of the Civil War Amendments, and that Congress is limited only to providing remedies for Court-determined infractions.

On the other hand, the Radical Republican Congress that spearheaded the Civil War Amendments were suspicious of a Supreme Court that, as of 1865, still included 4 Justices – Justices Wayne, Nelson, Catron, and Grier – who had voted with the majority in 1857 in Dred Scott v. Sandford, and a fifth Justice, Justice Clifford, confirmed in 1858 after being nominated by President Buchanan, also perceived as a Southern sympathizer. This suggests that the enforcement provisions of the Civil War Amendments were an attempt by Congress to reserve some ultimate interpretive power for itself as to the meaning of the 13th, 14th, and 15th Amendments.81

The range of civil rights legislation passed by Congress between 1866 and 1871 also suggests that Congress had this broader vision of the power granted to it under the Civil War Amendments. Between 1866 and 1871, Congress passed a number of civil rights statutes, now codified at 42 U.S.C. §§ 1981-1986.82 Further, Congress provided some statutory protection to enforce the 15th Amendment's provisions regarding banning the denial of voting rights on account of race in the Enforcement Act of 1870. This Act was an attempt to regulate the violence and intimidation by the Ku Klux Klan regarding voting by blacks in 1868 and 1870.83

Regarding the meaning of term “appropriate” legislation, which appears in the 13th, 14th, and 15th Amendments, the Court had stated in 1819 in McCulloch v. Maryland,84 “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

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81 See generally Wayne D. Moore, The Fourteenth Amendment’s Initial Authority: Problems of Constitutional Coherence, 13 Temple P. & Civ. R. L. Rev. 515, 528-31 (2004); James W. Fox, Jr., Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section 5 Enforcement Powers, 91 Ky. L.J. 67, 91-108 (2002-03). By 1865, Congress had added a 10th seat to the Court, to give Lincoln another appointment, bringing to 5 the number of Lincoln nominees on the Court in 1865. Once Lincoln was assassinated, Congress reduced the number of Justices to 7, to prevent President Johnson from having any nominations, and then increased the size to 9 once Grant became President. The Court size has remained at 9 ever since, as codified at 28 U.S.C. § 1.

82 On all of these civil rights statutes, see generally HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 2-28 (2001); Barry Sullivan, Comment, Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981, 98 Yale L.J. 541, 547-64 (1989).


84 17 U.S. (4 Wheat.) 316, 421 (1819).
adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” As applied to the Necessary and Proper Clause of Article I, § 8, cl. 18, this language has been read to give Congress great latitude to determine “appropriate” legislation. This suggests that, as with the Necessary and Proper Clause in Article I, § 8, great latitude should be given to Congress in determining “appropriate” legislation under the Civil War Amendments.

During the formalist era the Court adopted a limited view regarding Congress’ enforcement powers. For example, Congress passed the Civil Rights Act of 1875, which banned discrimination in places of public accommodation. That Act was struck down in 1883 in The Civil Rights Cases as violating the Court’s understanding of the state action limits of the 14th Amendment. One author has remarked, “The Justices . . . pervert[ed] the plain intent of the Fourteenth Amendment – and the Fifteenth Amendment too . . . . Through the 1860's and 1870's, Congress had passed a series of laws designed to put teeth into the otherwise empty words of the post-war Amendments . . . . [T]he Court imperiously and impatiently swept aside almost all of these so-called Civil Rights Acts, either by flatly branding them – unconstitutional – no matter that the Constitution had been amended precisely to achieve what these laws were aimed to achieve – or by using legalistic chop-logic to ‘interpret’ them out of effective existence.” Congressional attempts to enforce the 15th Amendment's voting provisions in the face of Ku Klux Klan activity seeking to minimize black turnout were also substantially frustrated.

The assumption during the Holmesian era also seemed to be that only the Court could determine whether a violation of the Civil War Amendments had occurred. Congress was limited to providing remedies for Court-determined infractions. Under this reasoning, when the Court held in Lassiter v. Northampton County Board that a literacy test for voting was fair on its face, and was not used in a racially discriminatory fashion, and thus did not violate the 15th Amendment, there could be no Civil War Amendment basis for contrary congressional action.

During the instrumentalist era, in cases such as Katzenbach v. Morgan, excerpted below, the Court embraced the view, consistent with the practices of the Radical Republican Congresses in passing various civil rights law between 1866-1875, that Congress had independent power to determine for itself violations of the Civil War Amendments. As has been noted, “The Framers saw Congress, and

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not the federal courts, as the primary protector of the rights of their citizens. Congress' rights-generating power, and not that of the federal courts, was central to the original meaning of the Fourteenth Amendment.90 The Court also held in Katzenbach that “appropriate” legislation would be tested only by the minimal “plainly adapted to that end” standard of review of McCulloch v. Maryland.91

Both of these conclusions have been limited by decisions during the modern natural law era. While still being faithful to the core holdings of the instrumentalist-era cases, the modern Court has moved in cases such as City of Boerne v. Flores,92 excerpted below, to reinstate the view that congressional power under the Civil War Amendments is remedial only, and has created a test for determining “appropriate” legislation that focuses on the “congruence and proportionality” of the congressional action given the mischief to be remedied. This “congruence and proportionality” test is a higher burden for Congress to meet than the “plainly adapted to that end” test of McCulloch v. Maryland."

Katzenbach v. Morgan
384 U.S. 641 (1966)

Justice BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of § 4(e) of the Voting Rights Act of 1965. That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English.

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides – even with the guidance of a congressional judgment — that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction. As was said with


91 Katzenbach, 384 U.S. at 656-58.

regard to § 5 in *Ex parte Com. of Virginia*, 100 U.S. 339, 345 [(1879)]: “It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.” A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the “majestic generalities” of § 1 of the Amendment. See *Fay v. People of State of New York*, 332 U.S. 261, 282-284 [(1947)].

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45 [(1955)], sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, s 8, cl. 18. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

Section 4(e) may be readily seen as “plainly adapted” to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain “perfect equality of civil rights and the equal protection of the laws.” It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with
the evil, the adequacy or availability of alternative remedies, and the nature and significance of the 
state interests that would be affected by the nullification of the English literacy requirement as 
applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It 
is not for us to review the congressional resolution of these factors. It is enough that we be able to 
perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such 
a basis to support § 4(e) in the application in question in this case. Any contrary conclusion would 
require us to be blind to the realities familiar to the legislators.

Justice HARLAN, whom Mr. Justice STEWART joins, dissenting.

Worthy as its purposes may be thought by many, I do not see how § 4(e) of the Voting Rights Act 
sacrifice of fundamentals in the American constitutional system – the separation between the 
legislative and judicial function and the boundaries between federal and state political authority.

When recognized state violations of federal constitutional standards have occurred, Congress is of 
course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. 
See Strauder v. West Virginia, 100 U.S. 303, 310. But it is a judicial question whether the condition 
with which Congress has thus sought to deal is in truth an infringement of the Constitution, 
something that is the necessary prerequisite to bringing the § 5 power into play at all.

Section 4(e), however, presents a significantly different type of congressional enactment. The 
question here is not whether the statute is appropriate remedial legislation to cure an established 
violation of a constitutional command, but whether there has in fact been an infringement of that 
constitutional command, that is, whether a particular state practice or, as here, a statute is so 
arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth 
Amendment. That question is one for the judicial branch ultimately to determine. Were the rule 
otherwise, Congress would be able to qualify this Court's constitutional decisions under the 
Fourteenth and Fifteenth Amendments let alone those under other provisions of the Constitution, 
by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's 
holding in Lassiter, supra, that an English literacy test is a permissible exercise of state supervision 
over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has 
undertaken to do by § 4(e). In effect the Court reads § 5 of the Fourteenth Amendment as giving 
Congress the power to define the substantive scope of the Amendment. If that indeed be the true 
reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 
“discretion” by enacting statutes so as in effect to dilute equal protection and due process decisions 
of this Court. In all such cases there is room for reasonable men to differ as to whether or not a 
denial of equal protection or due process has occurred, and the final decision is one of judgment. 
Until today this judgment has always been one for the judiciary to resolve.

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Boerne v. Flores
521 U.S. 507 (1997)

Justice KENNEDY delivered the opinion of the Court.

[The] RFRA [Religious Freedom Restoration Act of 1993] prohibits “[g]overnment” from “substantially burden[ing]” a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” [42 U.S.C.] § 2000bb-1. The Act's mandate applies to any “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,” as well as to any “State, or . . . subdivision of a State.” § 2000bb-2(1). The Act's universal coverage is confirmed in § 2000bb-3(a), under which RFRA “applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment].” In accordance with RFRA's usage of the term, we shall use “state law” to include local and municipal ordinances.

Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). There we considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in Sherbert v. Verner, 374 U.S. 398 (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. We stated: “[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is ‘compelling’ . . . contradicts both constitutional tradition and common sense.” 494 U.S., at 885 (internal quotation marks and citations omitted).

Four Members of the Court disagreed. They argued the law placed a substantial burden on the Native American Church members so that it could be upheld only if the law served a compelling state interest and was narrowly tailored to achieve that end. Id., at 894. Justice O'Connor concluded Oregon had satisfied the test, while Justice Blackmun, joined by Justice Brennan and Justice Marshall, could see no compelling interest justifying the law's application to the members.

These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA.
The parties disagree over whether RFRA is a proper exercise of Congress's § 5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."

In defense of the Act, respondent the Archbishop contends, with support from the United States, that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under Smith. It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that § 5 includes the power to enact legislation designed to prevent, as well as remedy, constitutional violations. It is further contended that Congress's § 5 power is not limited to remedial or preventive legislation.

Congress' power under § 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," South Carolina v. Katzenbach, [383 U.S. 301 (1966)], at 326. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

There is language in our opinion in Katzenbach v. Morgan, 384 U.S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one. In Morgan, the Court considered the constitutionality of § 4(e) of the Voting Rights Act of 1965, which provided that no person who had successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote because of an inability to read or write English. New York's Constitution, on the other hand, required voters to be able to read and write English. The Court provided two related rationales for
its conclusion that § 4(e) could “be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government.” Id., at 652. Under the first rationale, Congress could prohibit New York from denying the right to vote to large segments of its Puerto Rican community, in order to give Puerto Ricans “enhanced political power” that would be “helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.” Ibid. Section 4(e) thus could be justified as a remedial measure to deal with “discrimination in governmental services.” Id., at 653. The second rationale, an alternative holding, did not address discrimination in the provision of public services but “discrimination in establishing voter qualifications.” Id., at 654. The Court perceived a factual basis on which Congress could have concluded that New York's literacy requirement “constituted an invidious discrimination in violation of the Equal Protection Clause.” Id., at 656. Both rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it. As Justice Stewart explained in Oregon v. Mitchell, [400 U.S. 112 (1970)], at 296, interpreting Morgan to give Congress the power to interpret the Constitution “would require an enormous extension of that decision's rationale.”

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Marbury v. Madison, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. See Van Alstyne, The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment, 46 Duke L.J. 291, 292-303 (1996). Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is 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. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See City of Rome, 446 U.S., at 177 (since “jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination,” Congress could “prohibit changes that have a discriminatory impact” in those jurisdictions). Remedial legislation under § 5 “should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.” Civil Rights Cases, 109 U.S., at 13.

RFRA is not so confined. . . .

It is for Congress in the first instance to “determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,” and its conclusions are entitled to much deference. Katzenbach v. Morgan, 384 U.S., at 651. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the
Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

Justice STEVENS, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a “law respecting an establishment of religion” that violates the First Amendment to the Constitution. [Ed.: Given this view, it was unnecessary for Justice Stevens to address the § 5 issue addressed by the majority.]

Justice O'CONNOR, with whom Justice BREYER joins except as to the first paragraph of Part I, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act of 1993 (RFRA) is a proper exercise of Congress' power to enforce § 5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether Smith represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in Smith, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that Smith improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I agree with much of the reasoning set forth in Part III-A of the Court's opinion. Indeed, if I agreed with the Court's standard in Smith, I would join the opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the “power to decree the substance of the Fourteenth Amendment's restrictions on the States.” (emphasis added). Rather, its power under § 5 of the Fourteenth Amendment extends only to enforcing the Amendment's provisions. In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute. Accordingly, whether Congress has exceeded its § 5 powers turns on whether there is a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”

Justice SOUTER, dissenting.

To decide whether the Fourteenth Amendment gives Congress sufficient power to enact the Religious Freedom Restoration Act of 1993, the Court measures the legislation against the free-exercise standard of Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S.
872 (1990). For the reasons stated in my opinion in Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 564-577 (1993) (opinion concurring in part and concurring in judgment), I have serious doubts about the precedential value of the Smith rule and its entitlement to adherence. These doubts are intensified today by the historical arguments going to the original understanding of the Free Exercise Clause presented in Justice O'Connor's dissent, which raises very substantial issues about the soundness of the Smith rule. But without briefing and argument on the merits of that rule (which this Court has never had in any case, including Smith itself, see Lukumi, 508 U.S., at 571-572), I am not now prepared to join Justice O'Connor in rejecting it or the majority in assuming it to be correct. In order to provide full adversarial consideration, this case should be set down for reargument permitting plenary reexamination of the issue. Since the Court declines to follow that course, our free-exercise law remains marked by an “intolerable tension,” id., at 574, and the constitutionality of the Act of Congress to enforce the free-exercise right cannot now be soundly decided. I would therefore dismiss the writ of certiorari as improvidently granted, and I accordingly dissent from the Court's disposition of this case.

Justice BREYER, dissenting.

I agree with Justice O'Connor that the Court should direct the parties to brief the question whether Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), was correctly decided, and set this case for reargument. I do not, however, find it necessary to consider the question whether, assuming Smith is correct, § 5 of the Fourteenth Amendment would authorize Congress to enact the legislation before us. Thus, while I agree with some of the views expressed in the first paragraph of Part I of Justice O'Connor's dissent, I do not necessarily agree with all of them. I therefore join Justice O'Connor's dissent, with the exception of the first paragraph of Part I.

In Hankins v. Lyght, the Second Circuit upheld on Commerce Clause grounds the Religious Freedom Restoration Act of 1993, as applied to federal laws, rather than state laws struck down in Boerne v. Flores under § 5 of the 14th Amendment. In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, the Supreme Court similarly applied the RFRA’s compelling interest test to strike down the failure under the federal Controlled Substance Act to grant an exception for sacramental use of hallucinogenic tea. The decision was unanimous, with Justice Alito not participating in the consideration or decision of the case.

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93 441 F.3d 96, 107-09 (2nd Cir. 2006).

CHAPTER 8: LIMITATIONS ON FEDERAL LEGISLATIVE POWER

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§ 8.1 10th Amendment Limits on Federal Legislative Power

1. Historical Overview of 10th Amendment Doctrine

   A. The Original Natural Law Era: 1789-1873

   The text of the 10th Amendment 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.” As stated in United States v. Darby, “The amendment states but a truism that all is retained
   which has not been surrendered. . . . From the beginning and for many years the amendment has
   been construed as not depriving the national government of authority to resort to all means for the
   exercise of a granted power which are appropriate and plainly adapted to the permitted end.”

   On this understanding, the 10th Amendment was originally intended and understood to mean that
   states are free to legislate in areas not covered by prohibitions or the Supremacy Clause. However,
   the 10th Amendment did not create any state immunity from federal action or create any areas of
   exclusively state power. As stated in Darby, “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.”

   A similar understanding of the 10th Amendment appeared in Livingston v. Van Ingen, decided by
   a New York court in 1812. There the judge said that a grant of power to Congress does not, without
   more, take any power away from the states, but that the 10th Amendment does not limit federal

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1  312 U.S. 100, 124 (1941).
2  Id.
3  9 Johns 507 (N.Y. 1812).
power either. In *Houston v. Moore*, in 1820, the Court reaffirmed this position in an opinion by Justice Story, noting also that if Congress legislates, any conflicting state laws must give way under the Supremacy Clause, a conclusion reaffirmed four years later in 1824 in *Gibbons v. Ogden*. Despite this view, one could take the position that the 10th Amendment at least cautions the Court that states’ rights considerations should be taken into account in interpreting the other provisions of the Constitution. This was the position of Thomas Jefferson and other states’ rights supporters.

Beginning with the Taney Court in 1836, the Court’s language in cases implicitly raising 10th Amendment issues did focus more on the power of the states, rather than the power of Congress. For example, in 1837, the Court held in *Mayor, Alderman and Commonalty of City of New York v. Miln* that states have a field of exclusive power in their internal police. In 1851, the Court said in *Cooley v. Board of Wardens* that some subjects of regulation might be exclusively for the states. In *Lane County v. Oregon*, decided in 1869, the Court went further, saying, "In many articles of the Constitution, the independence of the states within their spheres is distinctly recognized. To them nearly all of the interior regulation is given and certainly all that is not expressly given to Congress." In *Texas v. White*, also decided in 1869, the Court stated, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”

### B. The Formalist Era: 1873-1937

Cases during the formalist era rarely raised the 10th Amendment explicitly. The formalist Court’s doctrine regarding the Commerce Clause, addressed at § 6.1; the Taxing Power, discussed at § 7.1.1 nn. 4-6; and Spending Power, discussed at § 7.2.1 nn.29-32, sufficiently limited federal power that typically no resort to the 10th Amendment was needed. Instead, the 10th Amendment served as a reminder of state sovereignty rights, those rights protected directly by Court decisions under the Commerce Clause, Taxing Clause, Spending Clause, or other similar formalist-era doctrines, like the formalist approach to the 11th Amendment doctrine of state sovereign immunity, discussed at § 8.2.1(B) nn.51-53.

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4 18 U.S. 1, 48-50 (1820) (Story, J., opinion).

5 See generally James B. Staab, *The Tenth Amendment and Justice Scalia’s “Split Personality”* 16 J.L. & Pol. 231, 244-51 (2000).

6 36 U.S. 102, 138 (1837).

7 53 U.S. 299, 318-21 (1851).

8 74 U.S. 71, 76 (1869).

9 74 U.S. 700, 725 (1869).
Despite this approach towards the 10th Amendment, a moderate formalist majority did note in 1936 in *United States v. Butler*\(^\text{10}\) that Congress' taxing power may be adopted as a means, consistent with the Necessary and Proper Clause, to carry into operation another enumerated power. This suggested a willingness to broaden the powers that Congress could be held to have under the various provisions in the Constitution. However, certain subjects, such as intrastate commerce, which included agriculture, manufacturing, and mining, were at that time still thought to be exclusively for the states, as addressed at § 6.1.

**C. The Holmesian Era: 1937-1954**

Cases after 1937 recognized such great federal commerce power that by 1941, in *United States v. Darby*,\(^\text{11}\) Justice Stone could say for the Court that the 10th Amendment merely states a “truism” that all is retained by the states that has not been surrendered. There is nothing in its history, he said, to suggest that it was “more than declaratory of the relationships between the national and state governments that had been established by the Constitution before the Amendment.”

The Holmesian-era Court applied this doctrine in cases like *Case v. Bowles*,\(^\text{12}\) which involved the federal Emergency Price Control Act applied to a sale of timber by the state of Washington. The Court thus appeared to return to the original understanding with respect to the powers of Congress and the 10th Amendment. This approach reflected the liberal Holmesian predisposition of President Roosevelt’s appointments to the Supreme Court to defer to the national government, as opposed to the conservative Holmesian predisposition to defer more to state governments, as discussed at § 8.1.1(E) n.30.

**D. The Instrumentalist Era: 1954-1986**

During the first part of the instrumentalist era, the Court followed *Darby* in holding that the 10th Amendment merely states a truism, with congressional power found under the instrumentalist approach to the Commerce Clause.\(^\text{,}^\text{,}\) Thus, in 1964, the Court held that Federal Employers’ Liability Act could be applied to a state-owned railroad in *Parden v. Terminal Ry., of Alabama State Docks Department*.\(^\text{13}\) In 1968, the Court upheld the wage and hour provisions of the Fair Labor Standards Act as applied to employees of public schools and hospitals in *Maryland v. Wirtz*.\(^\text{14}\)

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\(^{10}\) 297 U. S. 1, 65-70 (1936).

\(^{11}\) 312 U. S. 100, 124 (1941).

\(^{12}\) 327 U. S. 92, 101-03 (1946).

\(^{13}\) 377 U. S. 184, 190-93 (1964).

In 1975, in *Fry v. United States*, the Economic Stabilization Act was applied to limit wage increases of state employees. In *Fry*, however, Justice Marshall's majority opinion included a footnote, which stated, "The [10th] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." One year later, in 1976, Justice Rehnquist seized on Marshall's footnote in *Fry*, and was able to assemble a 5-Justice majority to overrule *Maryland v. Wirtz*, distinguish *Fry*, and hold that the minimum wage and maximum hours provisions of the federal Fair Labor Standards Act could not be applied to state and local employees.

In a departure from the usual instrumentalist approach of this era, a 5-4 Court held in *National League of Cities v. Usery* that the 10th Amendment prohibits Congress, when exercising its Commerce Clause power, from directly displacing a state's freedom to structure integral operations in areas of traditional governmental functions. Joining conservative Holmesian Justice Rehnquist's opinion unreservedly were conservative formalist Chief Justice Burger, conservative Holmesian Justice Stewart, and moderate conservative natural law Justice Powell, who was always a strong supporter of states' rights, a product perhaps of his Southern up-bringing in Virginia.

There were four dissents in *National League*. Liberal instrumentalist Justices Brennan and Marshall, along with liberal Holmesian Justice White, said the majority had returned to the early 1930s formalist-era jurisprudence by using the 10th Amendment as a cover for invalidating a congressional judgment with which they disagreed. Moderate liberal instrumentalist Justice Stevens also dissented, saying that he could not find a principled limitation on federal power that would not also invalidate federal regulation of state activities he considered unquestionably permissible.

The critical fifth vote in *National League* belonged to Justice Blackmun. Justice Blackmun is perhaps the best example of a contemporary judge who began his service on the Court during the 1970s deciding cases more as a moderate natural law judge, but whose decisions in the 1980s and 1990s reflected more of a liberal instrumentalist approach. In *National League*, Justice Blackmun balanced the demands of federal versus state power, creating an area for state sovereignty, but noted that federal power should not be outlawed "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." Reflecting Justice Blackmun's balancing approach, several later

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16 Id. at 547 n.7.
18 Id. at 856, 867-68 (Brennan, J., joined by White & Marshall, JJ., dissenting).
19 Id. at 880-81 (Stevens, J., dissenting).
20 Id. at 856 (1976) (Blackmun, J., concurring).
cases limited the potential impact of *National League*.

Further, the *National League* doctrine was never held to limit Congress' power to spend for the General Welfare. Nor was congressional power to enforce the 14th Amendment limited by the 10th Amendment.

In 1985, nine years after *National League*, at the end of the instrumentalist era, Justice Blackmun abandoned his balancing approach in *Garcia v. San Antonio Metropolitan Transit Authority*, excerpted below. In *Garcia*, he joined with liberal instrumentalists Justices Brennan, Marshall, and Stevens, and liberal Holmesian Justice White, to overrule *National League* in favor of a strong pro-federal power decision. Justice Blackmun said in his opinion for the Court that it was unworkable to seek limits on Congress' power in terms of particular governmental functions, whether "traditional," "integral," "ordinary," or "necessary." Such distinctions merely invite judges to decide on what state policies they favor or dislike. Blackmun noted that any 10th Amendment limits on Congress' Commerce Clause power are in the procedural safeguards inherent in the structure and political processes of the federal system, including the lobbying ability of groups like the National Governors' Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors, the National League of Cities, International City/County Management Association, and the Council of State Governments.

Justice Powell dissented in *Garcia*, joined by Chief Justice Burger, and Justices Rehnquist and O'Connor. Justice Powell said that the Court was improperly withdrawing from expected difficulties in drawing lines, was ignoring the essence of federalism which required federal respect for

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\[ ^{21} \text{See, e.g., Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (*National League* does not apply to federal law which regulates individuals and not the States); United Transp. Union v. Long Island R. Co., 455 U.S. 687 (1982) (Federal Railway Labor Act can be applied to a state-owned railroad since running a railroad is not a traditional state function); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (a federal statute may require state utility commissions to consider certain federal policies and follow specific procedures); *id.* at 771 (Powell, J., concurring in part and dissenting in part); *id.* at 775 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part); Federal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226 (1983) (federal Age Discrimination Act can be applied to state and local employees); *id.* at 251 (Burger, C.J., joined by Powell, Rehnquist & O'Connor, JJ., dissenting).} \]


\[ ^{24} \text{Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530-31 (1985) (Blackmun, J., for the Court) (Fair Labor Standards Act can be applied to city bus drivers).} \]

\[ ^{25} \text{Id. at 547-54.} \]
legitimate state interests, and was mistaken in its evaluation of the strength of state involvement in federal processes. Justice Rehnquist wrote separately to emphasize that his opinion in *National League* did not call for a balancing of federal and state interests, and he predicted that one day it would again command a majority on the Court. In an attempt to save something of *National League*, Justice Scalia later said in *South Carolina v. Baker* that Blackmun's opinion in *Garcia* had noted constitutional structure as the source of some limits on federal action affecting states.

**Garcia v. San Antonio Metropolitan Transit Authority**  
469 U.S. 528 (1985)

Justice BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." Id., at 852.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

The prerequisites for governmental immunity under *National League of Cities* were summarized by this Court in *Hodel*. Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the States as States." Second, the statute must "address matters that are indisputably [attributes] of state sovereignty." Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission." 452 U.S., at 287-288, and n.29, quoting National League of Cities, 426 U.S., at 845, 852, 854.

26 *Id.* at 557-60 (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ., dissenting); *id.* at 579-80 (Rehnquist, J., dissenting).

The controversy in the present cases has focused on the third Hodel requirement – that the challenged federal statute trench on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." 557 F. Supp., at 447. Just how troublesome the task has been is revealed by the results reached in other federal cases.

Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under National League of Cities. In that case the Court set forth examples of protected and unprotected functions, see 426 U.S., at 851, 854, n.18, but provided no explanation of how those examples were identified. The only other case in which the Court has had occasion to address the problem is Long Island. We there observed: "The determination of whether a federal law impairs a state's authority with respect to 'areas of traditional [state] functions' may at times be a difficult one." 455 U.S., at 684, quoting National League of Cities, 426 U.S., at 852. The accuracy of that statement is demonstrated by this Court's own difficulties in Long Island in developing a workable standard for "traditional governmental functions." We relied in large part there on "the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments," but we simultaneously disavowed "a static historical view of state functions generally immune from federal regulation." 455 U.S., at 686 (first emphasis added; second emphasis in original). We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," id., at 686-687, but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic. Finally, having disclaimed a rigid reliance on the historical pedigree of state involvement in a particular area, we nonetheless found it appropriate to emphasize the extended historical record of federal involvement in the field of rail transportation. Id., at 687-689.

Many constitutional standards involve "[undoubted] . . . gray areas," Fry v. United States, 421 U.S. 542, 558 (1975) (dissenting opinion), and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause. A further cautionary note is sounded, however, by the Court's experience in the related field of state immunity from federal taxation.

If these tax-immunity cases had any common thread, it was in the attempt to distinguish between "governmental" and "proprietary" functions. [Ed.: Addressed in this Coursebook at § 7.2.2(B) n.25] It was this uncertainty and instability that led the Court shortly thereafter, in New York v. United States, 326 U.S. 572 (1946), unanimously to conclude that the distinction between "governmental" and "proprietary" functions was "unteenable" and must be abandoned. See id., at 583 (opinion of Frankfurter, J., joined by Rutledge, J.); id., at 586 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.); id., at 590-596 (Douglas, J., dissenting, joined by Black, J.).

The distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the
alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable. We rejected the possibility of making immunity turn on a purely historical standard of "tradition" in *Long Island*, and properly so. The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions. At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.

A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard. The goal of identifying "uniquely" governmental functions, for example, has been rejected by the Court in the field of government tort liability in part because the notion of a "uniquely" governmental function is unmanageable. See Indian Towing Co. v. United States, 350 U.S. 61, 64-68 (1955); see also Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 433 (1978) (dissenting opinion). Another possibility would be to confine immunity to "necessary" governmental services, that is, services that would be provided inadequately or not at all unless the government provided them. Cf. Flint v. Stone Tracy Co., 220 U.S., at 172. The set of services that fits into this category, however, may well be negligible. . . . It also is open to question how well equipped courts are to make this kind of determination about the workings of economic markets.

We believe, however, that there is a more fundamental problem at work here . . . . The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," Anderson v. Dunn, 6 Wheat. 204, 226 (1821), and the States cannot serve as laboratories for social and economic experiment, see New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands. In the words of Justice Black: "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, the people – acting not through the courts but through their elected legislative representatives – have the power to determine as conditions demand, what services and functions the public welfare requires." Helvering v. Gerhardt, 304 U.S., at 427 (concurring opinion).
We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it diserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

The States unquestionably do "[retain] a significant measure of sovereign authority." EEOC v. Wyoming, 460 U.S., at 269 (Powell, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong. 1897 (1791).

When we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. 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. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U.S. Const., Art. I, § 2, and Art. II, § 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, § 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V.

The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one; Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act. In the past quarter century alone, federal grants to States and localities have grown from $ 7 billion to $ 96 billion. As a result, federal grants now account for about one-fifth of state and local government expenditures. The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation. Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress
under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions.

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process. Nonetheless, against this background, we are convinced that the 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. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." EEOC v. Wyoming, 460 U.S., at 236.

We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See United States v. Darby, 312 U.S. 100, 116-117 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.


Justice POWELL, with whom THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty. Members of Congress are elected from the various States, but once in office they are Members of the Federal Government. Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment. We noted recently "[the] hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power. . . ." INS v. Chadha, 462 U.S. 919, 951 (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States.

More troubling than the logical infirmities in the Court's reasoning is the result of its holding, i.e., that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system. See, e.g., The Federalist No. 78 (Hamilton). At least since *Marbury v. Madison*, 1 Cranch 137, 177 (1803), it has been the settled province of the federal judiciary "to say what the law is" with respect to the constitutionality of Acts of Congress.
In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Much of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress. Samuel Adams argued, for example, that if the several States were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in Anti-Federalists versus Federalists 159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4-12, 1788), reprinted in Anti-Federalists versus Federalists, supra, at 208-209.

Antifederalists raised these concerns in almost every state ratifying convention. See generally 1-4 Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d. ed. 1876). As a result, eight States voted for the Constitution only after proposing amendments to be adopted after ratification. All eight of these included among their recommendations some version of what later became the Tenth Amendment. Ibid. So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary. See 1 B. Schwartz, The Bill of Rights: A Documentary History 505 and passim (1971). It was thus generally agreed that consideration of a bill of rights would be among the first business of the new Congress. See generally 1 Annals of Cong. 432-437 (1789) (remarks of James Madison). Accordingly, the 10 Amendments that we know as the Bill of Rights were proposed and adopted early in the first session of the First Congress. 2 Schwartz, The Bill of Rights, supra, at 983-1167.

The Court maintains that the standard approved in National League of Cities "disserves principles of democratic self-governance." In reaching this conclusion, the Court looks myopically only to persons elected to positions in the Federal Government. It disregards entirely the far more effective role of democratic self-government at the state and local levels. One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted. Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and
regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.

In drawing this contrast, I imply no criticism of these federal employees or the officials who are ultimately in charge. The great majority are conscientious and faithful to their duties. My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels – not in Washington as the Court so mistakenly thinks – that "democratic self-government" is best exemplified.

. . . In overruling National League of Cities, today's opinion apparently authorizes federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees.

The Court emphasizes that municipal operation of an intracity mass transit system is relatively new in the life of our country. It nevertheless is a classic example of the type of service traditionally provided by local government. It is local by definition. It is indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems. Services of this kind are precisely those with which citizens are more "familiarly and minutely conversant." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). State and local officials of course must be intimately familiar with these services and sensitive to their quality as well as cost. Such officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires. See National League of Cities, 426 U.S., at 847-852.

As I view the Court's decision today as rejecting the basic precepts of our federal system and limiting the constitutional role of judicial review, I dissent.

Justice REHNQUIST, dissenting.

I join both Justice Powell's and Justice O'Connor's thoughtful dissents. Justice Powell's reference to the "balancing test" approved in National League of Cities is not identical with the language in that case, which recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to "the States' separate and independent existence." Nor is either test, or Justice O'Connor's suggested approach, precisely congruent with Justice Blackmun's views in 1976, when he spoke of a balancing approach which did not outlaw federal power in areas "where the federal interest is demonstrably greater." But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.
Subsequent to *Garcia*, states were able to get some modifications of the overtime provision of the Fair Labor Standards Act. Instead of always having to pay time-and-a-half for overtime, states can grant their employees one-and-a-half hours of “compensation time” of work to make up for overtime hours worked, as long as the employee has agreed to this arrangement, up to a maximum of 240 hours (480 for public safety employees).

This is useful for states, as sometimes their workers typically work more than 40 hours when the legislature is in session, but less than 40 hours when they are not.

E. The Modern Natural Law Era: 1986-Today

Despite the 10th Amendment doctrine of *Garcia*, state rights have been indirectly enhanced after *Garcia* in two ways. First, in *Gregory v. Ashcroft*, Justice O’Connor set forth policy reasons why the 10th Amendment reflected a desire for states to have substantial reserved authority: to assure government sensitivity to diverse needs, increase opportunity for citizen involvement in democratic processes, allow for innovation and experimentation in government, make government more responsive, and check abuses of governmental power. Based on this analysis, the Court held in *Gregory v. Ashcroft* that Congress needs to make a clear statement in federal statutes for those statutes to apply also to states in their sovereign capacity. This opinion was joined unreservedly by conservative Holmesian Chief Justice Rehnquist, conservative formalist Justice Scalia, and the natural law Justices Kennedy and Souter.

States’ rights under the 10th Amendment have also been enhanced after *Garcia* by cases that have limited Congress’ power to abrogate state 11th Amendment immunity and impose remedies on states either under Article I, § 8 or § 5 of the 14th Amendment. This doctrine is addressed at § 8.2.3.

During our Nation’s history, the two major political parties have disagreed over issues of federalism. In the period before the Civil War, the major federalism issues involved slavery and tariff policy. The Federalist Party, and its later incarnation in the Whig Party and the Republican Party, favored broader federal power over these matters. The Democratic Party of Jefferson and Jackson was more in favor of states’ rights. During this period, Federalist judges, like Chief Justice Marshall, favored broader federal power, while Democratic judges, like Chief Justice Taney, favored states’ rights.

After the Civil War resolved these issues in favor of federal power, federalism issues turned to matters of federal regulation of both economic and civil rights matters. Since the Civil War, conservatives in both the Republican and Democratic parties have resisted such federal economic

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and civil rights legislation, as part of a conservative pro-business and pro-traditional freedom to discriminate basis, and thus have emphasized states’ rights on these issues; liberals in both the Republican and Democratic parties have embraced federal power to legislate on these matters, resulting in support throughout the 20th and 21st centuries for a liberal, progressive agenda.

Since the 1960s, the Republican Party has become more conservative as a party, and the Democratic Party has become more liberal. This has happened in part because many conservative Democrats, particularly in the South, have gradually switched parties and become Republican, following the Democratic Party under President Lyndon Johnson becoming associated with federal legislation like the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and Nixon’s “Southern Strategy” of the 1960s and 1970s in response. As the Republican Party has become more conservative as a party, some moderate Republicans, particularly in Northern States, have begun to vote more often Democratic. Thus, in recent Presidential elections, Democratic candidates have tended to win most of the Northern and Pacific states that formed the base of President Abraham Lincoln’s election as a Republican in 1860, while Republican candidates have tended to win Southern and Western States that were the base of the Democratic Party in 1860 and thereafter. In modern times, conservative judges, typically Republicans, more often have favored states’ rights than liberal judges, typically Democrats, who have favored federal power.30

2. The 10th Amendment Principle of “No Commandeering”

Based upon the natural law style of interpretation’s great respect for precedent, it is likely that Garcia is still good law today, with only conservative formalist Justices (Scalia, Thomas, and Alito) and conservative Holmesian Justice (Chief Justice Roberts) being willing to vote to overrule its holding and reinstate some version of the approach of National League of Cities. However, modern natural law Justices have carved out some meaning for the 10th Amendment independent of Garcia by banning federal commandeering of state legislative, executive, or administrative agencies.

In New York v. United States,31 Justice O'Connor wrote for a 6-3 Court, including Justices Kennedy and Souter, that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" This doctrine is based upon the “dual theory of sovereignty.” As explained by Justice Kennedy in U.S. Term Limits, Inc v. Thornton,32 the genius of our founding generation was to split sovereignty in the United States system into two parts: states and federal government. As Chief Justice Marshall had noted in


McCulloch v. Maryland,\(^3\) excerpted at § 5.3, the founding generation established dual systems of government – states and federal government – each deriving its authority independently from the people. The Constitution, after all, was adopted by “We, the People,” not “We, the States.” Further the Constitution was ratified in special state conventions elected specially by the people for that purpose, not ratified by the existing state legislatures. Thus, in our system, there are two sovereign entities, the federal government and the states, which are linked by the Constitution’s Supremacy Clause of Article VI, § 2. Under this dual theory of sovereignty, the federal government can regulate both individuals and states where constitutional power exists under the United States Constitution. However, the federal government cannot tell the states in any manner how they should regulate their own people because that would be infringing on the states’ reserved sovereign power. The rule in New York was phrased a categorical barrier, not a balancing test depending on the extent of the commandeering or the importance of the federal government’s interest involved.

Reflecting the liberal predisposition to favor federal regulation, Justice White, dissented with Justices Blackmun and Stevens. He stated, “An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that ‘commands’ specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.”\(^3\) This quote, however, misses the point of New York that there is a difference between the federal government regulating the states directly, and telling the states how they have to regulate their own people.

The theory of New York v. United States that there is a difference between commanding a state to do something under Garcia, and commandeering a state by telling it how to regulate its own citizens, was extended in Printz v. United States,\(^3\) excerpted below. There, a 5-4 Court held that Congress could not require state officials to conduct a federally required background check on persons who had applied to purchase a gun. The holding has broad applications, being used by state officials following Gonzales v. Raich, excerpted at § 6.4, for the proposition that local law enforcement officers do not have to enforce any federal law, such as federal marijuana laws, and can acquiesce in medical marijuana use authorized under state laws.

Based upon history and practice, the Court suggested strongly in dicta in Printz that Congress can commandeer state judges to enforce the United States Constitution. This is based on the view that the framers and ratifiers’ expectations, given no federal court system under the Articles of Confederation, and congressional discretion to create lower federal courts in Art. I, § 8, cl. 9, was that state courts would be the primary initial enforcers of federal constitutional and statutory rights.\(^3\)

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\(^3\) 17 U.S. (4 Wheat.) 316, 402-05 (1819).
\(^4\) Id. at 201-02 (White, J., joined by Blackmun & Stevens, JJ., concurring in part and dissenting in part).
\(^6\) Id. at 903-08.
The Printz majority was made up of the same Justices who formed the majority in New York v. United States, minus Justice Souter. In his dissent in Printz, Justice Souter noted that while he agreed with Justices O’Connor and Kennedy regarding Congress’ lack of an ability to commandeer the state legislative process in New York, Justice Souter read The Federalist Papers, particularly language in Hamilton’s No. 27, to suggest that just as the framers and ratifiers assumed state judges could be commandeered for federal purposes, they assumed state executive officers could be commandeered. The majority in Printz disagreed, viewing the passages as only requiring state officials not to obstruct the operation of federal law, and permitting auxiliary aid, if they wished. The majority seems to have the better of this debate reading these passages against the backdrop of the “dual theory of sovereignty” and the lack of federal legislative or executive practice attempting to “commandeer” state executive or legislative officials for most of the Nation’s history.

Reflecting their moderate liberal instrumentalist approach, Justices Stevens, Ginsburg, and Breyer also dissented in Printz. They limited their dissent to questioning the rationale of New York as applied to state judicial or executive officers, thus inducing Justice Souter to join their dissent. In a later case it is likely that Justices like Justice Stevens, Ginsburg, and Breyer might be willing to question the entire “commandeering” doctrine in New York and Printz, just as Justice Stevens, along with Justices White and Blackmun, had questioned that rationale in New York.

The Court has made it clear that New York and Printz apply only where Congress attempts to “use” or “commandeer” state officials for federal purposes. These cases pose no 10th Amendment limit on Congress’ power to regulate states or individuals directly. Thus, in Reno v. Condon, excerpted below, a federal act barring unconsented disclosure of driver’s license information was applied to states and private parties. Since the federal statute regulated state workers at the state Department of Motor Vehicles, and did not tell those workers how to regulate their own citizens, the act was constitutional. If the federal government attempted to tell states how to regulate their own citizens, such as requiring driver’s licenses to contain certain information or be done in a standardized manner, that would likely be viewed as commandeering, although Congress could use its conditional Spending Clause power, addressed at § 7.2.2, to induce states to adopt such uniform licenses.

Under Condon, the federal government presumably could tell local law enforcement officials to forward any information they have collected on their own regarding terrorist activity, as that would be regulating the officers directly, while the federal government could not require the local law enforcement officials to aid the federal government in collecting such information. In a case decided before Condon, in City of New York v. United States, the Second Circuit Court of Appeals refused to hold unconstitutional two federal statutes that preempted a city executive order prohibiting city

37 521 U.S. at 911-18; id. at 970-76 (Souter, J., dissenting).

38 Id. at 939-40 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).


40 179 F.3d 29, 35-37 (2nd Cir. 1999).
officials from voluntarily providing federal authorities with information about the immigration status of aliens. Since the federal statutes did intrude on the city’s management, they should be ruled unconstitutional under Printz. The case involved a facial challenge to the federal statutes. In the absence of any showing of injury by the city of New York, the Second Circuit upheld the statute. The court “invited the city to inform us” of their “legitimate municipal functions” that might be impaired by the federal statute. The court specifically noted that had such justification been provided, it would have been a different case and “we offer no opinion on that question.”

In each of these cases, states, or cities, were parties to the litigation. In some cases, states, or cities, might choose not to challenge such federal regulation. They may want to conserve resources, they may not find the legislation sufficiently intrusive to warrant a constitutional challenge, or they may elect to enforce such regulations either to avoid antagonizing the federal government or because they approve of the legislation but do not want to face the political ramifications of enacting the statutory scheme themselves. Under any of these scenarios, private parties affected by the federal regulation may still wish to challenge the regulation in court. Cases have not made clear whether private parties have standing to challenge these laws when states decline to do so.

The Court made it clear in Printz that states can choose to aid the federal government in enforcement if states so wish, as was done under an Act of 1882 with respect to immigration matters, or in 1917 with respect to aspects of the draft during World War I. Thus, the better approach would seem to be to deny private parties any right to raise these issues in the absence of any official state complaint. One author has noted, “Courts generally have recognized that a political subdivision of a state has standing to raise a Tenth Amendment claim. At that point, however, some courts have drawn the line, ruling that private plaintiffs not affiliated with the government may not raise such a challenge. Other courts have extended standing to private plaintiffs begrudgingly, or have assumed such standing while questioning whether it constitutionally can exist. A third set has affirmatively recognized that private parties have standing to raise these claims.”

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Printz v. United States
521 U.S. 898 (1997)

Justice SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, commanding state and local law

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42 Ara B. Gershengorn, Private Party Standing to Raise Tenth Amendment Commandeering Challenges, 100 Colum. L. Rev. 1065, 1066 (2000).
enforcement officers to conduct background checks on prospective handgun purchasers and to
perform certain related tasks, violate the Constitution.

governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to
any person under 21, not resident in the dealer's State, or prohibited by state or local law from
purchasing or possessing firearms, § 922(b). It also forbids possession of a firearm by, and transfer
of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances,
persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully
present in the United States, persons dishonorably discharged from the Armed Forces, persons who
have renounced their citizenship, and persons who have been subjected to certain restraining orders
or been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney
General to establish a national instant background check system by November 30, 1998, Pub. L.
immediately puts in place certain interim provisions until that system becomes operative. Under the
interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from
the transferee a statement (the Brady Form), § 922(s)(1)(A)(i)(I), containing the name, address and
date of birth of the proposed transferee along with a sworn statement that the transferee is not among
any of the classes of prohibited purchasers, § 922(s)(3); (2) verify the identity of the transferee by
examining an identification document, § 922(s)(1)(A)(i)(II); and (3) provide the "chief law
enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy)
of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV). With some exceptions, the dealer must then
wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer
that he has no reason to believe the transfer would be illegal. § 922(s)(1)(A)(ii).

From the description set forth above, it is apparent that the Brady Act purports to direct state law
enforcement officers to participate, albeit only temporarily, in the administration of a federally
enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to
a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit
in the duty imposed upon them to make "reasonable efforts" within five days to determine whether
the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement
that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law
duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of
the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers
that they have no reason to believe the transactions would be illegal.

The petitioners here object to being pressed into federal service, and contend that congressional
action compelling state officers to execute federal laws is unconstitutional.

Because there is no constitutional text speaking to this precise question, the answer to the CLEOs'
challenge must be sought in historical understanding and practice, in the structure of the
Constitution, and in the jurisprudence of this Court.
Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws," Brief for United States 28. The Government's contention demands our careful consideration, since early congressional enactments "provide 'contemporaneous and weighty evidence' of the Constitution's meaning," Bowsher v. Synar, 478 U.S. 714, 723-724 (1986) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)). Indeed, such "contemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, fixes the construction to be given its provisions." Myers v. United States, 272 U.S. 52, 175 (1926) (citing numerous cases).

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155. It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; Holmgren v. United States, 217 U.S. 509, 516-517 (1910) (explaining that the Act of March 26, 1790 "conferred authority upon state courts to admit aliens to citizenship" and refraining from addressing the question "whether the States can be required to enforce such naturalization laws against their consent"); United States v. Jones, 109 U.S. 513, 519-520 (1883) (stating that these obligations were imposed "with the consent of the States" and "could not be enforced against the consent of the States"). Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302-305, taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548, and ordering the deportation of alien enemies in times of war, Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-578.

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress – even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. See C. Warren, The Making of the Constitution 325-327 (1928). And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called "transitory" causes of action was that
laws which operated elsewhere created obligations in justice that courts of the forum state would
enforce. See, e.g., McKenna v. Fisk, 42 U.S. 241 (1843). The Constitution itself, in the Full Faith
and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations

For these reasons, we do not think the early statutes imposing obligations on state courts imply a
power of Congress to impress the state executive into its service. Indeed, it can be argued that the
numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the
States' executive (notwithstanding the attractiveness of that course to Congress), suggests an
assumed absence of such power. The only early federal law the Government has brought to our
attention that imposed duties on state executive officers is the Extradition Act of 1793, which
required the "executive authority" of a State to cause the arrest and delivery of a fugitive from justice
upon the request of the executive authority of the State from which the fugitive had fled. See Act
of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. That was in direct implementation, however, of the
Extradition Clause of the Constitution itself, see Art. IV, § 2.

It is interesting to observe that Story's Commentaries on the Constitution, commenting upon the
same issue of why state officials are required by oath to support the Constitution, uses the same
"essential agency" language as Madison did in Federalist No. 44, and goes on to give more
numerous examples of state executive agency than Madison did; all of them, however, involve not
state administration of federal law, but merely the implementation of duties imposed on state officers
by the Constitution itself: "The executive authority of the several states may be often called upon
to exert Powers or allow Rights given by the Constitution, as in filling vacancies in the senate during
the recess of the legislature; in issuing writs of election to fill vacancies in the house of
representatives; in officering the militia, and giving effect to laws for calling them; and in the
surrender of fugitives from justice." 2 Story, Commentaries on the Constitution of the United States
577 (1851).

The Government points to a number of federal statutes enacted within the past few decades that
require the participation of state or local officials in implementing federal regulatory schemes. Some
of these are connected to federal funding measures, and can perhaps be more accurately described
as conditions upon the grant of federal funding than as mandates to the States; others, which require
only the provision of information to the Federal Government, do not involve the precise issue before
us here, which is the forced participation of the States' executive in the actual administration of a
federal program.

It is incontestible that the Constitution established a system of "dual sovereignty." Gregory v.
surrendered many of their powers to the new Federal Government, they retained "a residuary and
inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the
Constitution's text, Lane County v. Oregon, 74 U.S. 71 (1869); Texas v. White, 74 U.S. 700 (1869),
including (to mention only a few examples) the prohibition on any involuntary reduction or
combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the
Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the
amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights," Helvering v. Gerhardt, 304 U.S. 405, 414-415 (1938).

Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "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 Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and "the practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people – who were, in Hamilton's words, "the only proper objects of government," The Federalist No. 15, at 109. We have set forth the historical record in more detail elsewhere, see New York v. United States, 505 U.S. at 161-166, and need not repeat it here. It suffices to repeat the conclusion: "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." Id., at 166. The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"– "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. See New York, supra, at 168-169; United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring). Cf. Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) ("the State has no legitimate interest in protecting nonresidents"). As Madison expressed it: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245.

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, see Maryland v. EPA, 530 F.2d 215, 226 (CA4 1975); Brown v. EPA, 521 F.2d 827, 838-842 (CA9 1975); and the District of Columbia Circuit invalidated
the regulations on both constitutional and statutory grounds, see District of Columbia v. Train, 521 F.2d 971, 994 (CADC 1975). After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained.

Although we had no occasion to pass upon the subject in Brown, later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. In Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981), and FERC v. Mississippi, 456 U.S. 742 (1982), we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law. In Hodel we cited the lower court cases in EPA v. Brown, supra, but concluded that the Surface Mining Control and Reclamation Act did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field, Hodel, supra, at 288. In FERC, we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978, to contain only the "command" that state agencies "consider" federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field. We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," id., at 761-762.

When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in New York v. United States, 505 U.S. 144 (1992), were the so-called "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of the waste – effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. 505 U.S. 144 at 175-176. We concluded that Congress could constitutionally require the States to do neither. Id., at 176. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." Id., at 188.

The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of New York because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. See Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L. Rev. 1563, 1580, n.65 (1994). Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.
We held in \textit{New York} that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, 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. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

JUSTICE O'CONNOR, concurring.

Our precedent and our Nation's historical practices support the Court's holding today. The Brady Act violates the Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers. See \textit{ante}, at 23. Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program. Moreover, the directives to the States are merely interim provisions scheduled to terminate November 30, 1998. Note following 18 U.S.C. § 922. Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs. See, e.g., 23 U.S.C. § 402 (conditioning States' receipt of federal funds for highway safety program on compliance with federal requirements).

In addition, 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. See, e.g., 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice). The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The text of the Constitution provides a sufficient basis for a correct disposition of this case.

Article I, § 8, grants the Congress the power to regulate commerce among the States. Putting to one side the revisionist views expressed by Justice Thomas in his concurring opinion in \textit{United States v. Lopez}, 514 U.S. 549, 584 (1995), there can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.
Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. Using language that plainly refers only to powers that are "not" delegated to Congress, it 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." U.S. Const., Amdt. 10.

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress. See New York v. United States, 505 U.S. 144, 156 (1992) ("in a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other"). Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens. Indeed, it would be more reasonable to infer that federal law may impose greater duties on state officials than on private citizens because another provision of the Constitution requires that "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." U.S. Const., Art. VI, cl. 3.

Indeed, the historical materials strongly suggest that the Founders intended to enhance the capacity of the federal government by empowering it – as a part of the new authority to make demands directly on individual citizen – to act through local officials. Hamilton made clear that the new Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws." The Federalist No. 27, at 180. Hamilton's meaning was unambiguous; the federal government was to have the power to demand that local officials implement national policy programs. As he went on to explain: "It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which [the state and federal governments] might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." Ibid.

The Court's evaluation of the historical evidence, furthermore, fails to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution. Thus, for example, the decision by Congress to give President Wilson the authority to utilize the services of state officers in implementing the World War I draft, see Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81, surely indicates that the national legislature saw no constitutional impediment to the enlistment of state assistance during a federal emergency. The fact that the President was able to implement the program by respectfully "requesting" state action, rather than bluntly commanding it, is evidence that he was an effective statesman, but surely does not indicate that he doubted either his or Congress' power to use mandatory language if necessary. If there were merit to the Court's appraisal of this incident, one would assume that there would have been some contemporary comment on the supposed constitutional concern that hypothetically might have motivated the President's choice of language.
The Court's "structural" arguments are not sufficient to rebut that presumption. The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as registering young adults for the draft, 40 Stat. 80-81, creating state emergency response commissions designed to manage the release of hazardous substances, 42 U.S.C. §§ 11001, 11003, collecting and reporting data on underground storage tanks that may pose an environmental hazard, § 699a, and reporting traffic fatalities, 23 U.S.C. § 402(a), and missing children, 42 U.S.C. § 5779(a), to a federal agency.

As we explained in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985): "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. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." Id., at 550-551. Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

Far more important than the concerns that the Court musters in support of its new rule is the fact that the Framers entrusted Congress with the task of creating a working structure of intergovernmental relationships around the framework that the Constitution authorized. Neither explicitly nor implicitly did the Framers issue any command that forbids Congress from imposing federal duties on private citizens or on local officials. As a general matter, Congress has followed the sound policy of authorizing federal agencies and federal agents to administer federal programs. That general practice, however, does not negate the existence of power to rely on state officials in occasional situations in which such reliance is in the national interest. Rather, the occasional exceptions confirm the wisdom of Justice Holmes' reminder that "the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931).

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign state. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

Accordingly, I respectfully dissent.
JUSTICE SOUTER, dissenting.

In deciding these cases, which I have found closer than I had anticipated, it is The Federalist that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Hamilton in No. 27 first notes that because the new Constitution would authorize the National Government to bind individuals directly through national law, it could "employ the ordinary magistracy of each [State] in the execution of its laws." The Federalist No. 27, p. 174 (J. Cooke ed. 1961) (A. Hamilton). Were he to stop here, he would not necessarily be speaking of anything beyond the possibility of cooperative arrangements by agreement. But he then addresses the combined effect of the proposed Supremacy Clause, U.S. Const., Art. VI, cl. 2, and state officers's oath requirement, U.S. Const., Art. VI, cl. 3, and he states that "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 will be rendered auxiliary to the enforcement of its laws." The Federalist No. 27, at 174-175 (emphasis in original). The natural reading of this language is not merely that the officers of the various branches of state governments may be employed in the performance of national functions; Hamilton says that the state governmental machinery "will be incorporated" into the Nation's operation, and because the "auxiliary" status of the state officials will occur because they are "bound by the sanctity of an oath," id., at 175, I take him to mean that their auxiliary functions will be the products of their obligations thus undertaken to support federal law, not of their own, or the States', unfettered choices.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

I would add to the reasons Justice Stevens sets forth the fact that the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205, 237 (1990); D. Currie, The Constitution of the Federal Republic of Germany 66, 84 (1994); Mackenzie-Stuart, Foreward, Comparative Constitutional Federalism: Europe and America ix (M. Tushnet ed. 1990); Kimber, A Comparison of Environmental Federalism in the United States and the European Union, 54 Md. L. Rev. 1658, 1675-1677 (1995). They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. See Council of European Communities, European Council in Edinburgh, 11-12 December 1992, Conclusions of the Presidency 20-21 (1993); D. Lasok & K. Bridge, Law and Institutions of the European Union 114 (1994); Currie, supra, at 68, 81-84,
100-101; Frowein, Integration and the Federal Experience in Germany and Switzerland, 1 Integration Through Law 573, 586-587 (M. Cappelletti, M. Seccombe, & J. Weiler eds. 1986).

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. Cf. The Federalist No. 20, pp. 134-138 C. Rossiter ed. 1961) (J. Madison and A. Hamilton) (rejecting certain aspects of European federalism). But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem – in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. Cf. id., No. 42, p. 268 (J. Madison) (looking to experiences of European countries); id., No. 43, pp. 275, 276 (J. Madison) (same). And that experience here offers empirical confirmation of the implied answer to a question Justice Stevens asks: Why, or how, would what the majority sees as a constitutional alternative – the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy – better promote either state sovereignty or individual liberty? See ante, at 7-8, 23 (Stevens, J., dissenting).

Reno v. Condon
528 U.S. 141 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.


The DPPA regulates the disclosure and resale of personal information contained in the records of state DMVs. State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. Congress found that many States, in turn, sell this personal information to individuals and businesses. See, e.g., 139 Cong. Rec. 29466, 29468, 29469 (1993); 140 Cong. Rec. 7929(1994) (remarks of Rep. Goss). These sales generate significant revenues for the States. See Travis v. Reno, 163 F.3d 1000, 1002 (CA7 1998) (noting that the Wisconsin Department of Transportation receives approximately $ 8 million each year from the sale of motor vehicle information).

The DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent. The DPPA generally prohibits any state DMV, or officer, employee, or contractor thereof, from "knowingly disclosing or otherwise making available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a).
The DPPA's ban on disclosure of personal information does not apply if drivers have consented to the release of their data.

The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions. For example, the DPPA requires disclosure of personal information "for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act, the Clean Air Act, and chapters 301, 305, and 321-331 of title 49." 18 U.S.C. § 2721(b) (1994 ed., Supp. III) (citations omitted). The DPPA permits DMVs to disclose personal information from motor vehicle records for a number of purposes.

The DPPA's provisions do not apply solely to States. The Act also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV.

The DPPA establishes several penalties to be imposed on States and private actors that fail to comply with its requirements. The Act makes it unlawful for any "person" knowingly to obtain or disclose any record for a use that is not permitted under its provisions, or to make a false representation in order to obtain personal information from a motor vehicle record. §§ 2722(a) and (b). Any person who knowingly violates the DPPA may be subject to a criminal fine, §§ 2723(a), 2725(2). Additionally, any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use other than those specifically permitted by the DPPA may be subject to liability in a civil action brought by the driver to whom the information pertains. § 2724. While the DPPA defines "person" to exclude States and state agencies, § 2725(2), a state agency that maintains a "policy or practice of substantial noncompliance" with the Act maybe subject to a civil penalty imposed by the United States Attorney General of not more than $ 5,000 per day of substantial noncompliance. § 2723(b).

South Carolina law conflicts with the DPPA's provisions. Under that law, the information contained in the State's DMV records is available to any person or entity that fills out a form listing the requester's name and address and stating that the information will not be used for telephone solicitation. S. C. Code Ann. §§ 56-3-510 to 56-3-540 (Supp. 1998). South Carolina's DMV retains a copy of all requests for information from the State's motor vehicle records, and it is required to release copies of all requests relating to a person upon that person's written petition. § 56-3-520. State law authorizes the South Carolina DMV to charge a fee for releasing motor vehicle information, and it requires the DMV to allow drivers to prohibit the use of their motor vehicle information for certain commercial activities. §§ 56-3-530, 56-3-540.

The United States asserts that the DPPA is a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. 2 The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the
DPPA regulates is a "thing in interstate commerce," and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation. United States v. Lopez, 514 U.S. 549, 558-559 (1995). We agree with the United States' contention.

[Alternatively] South Carolina contends that the DPPA violates the Tenth Amendment because it "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions," Brief for Respondents 10, and thereby makes "state officials the unwilling implementors of federal policy," id. at 11. South Carolina emphasizes that the DPPA requires the State's employees to learn and apply the Act's substantive restrictions, which are summarized above, and notes that these activities will consume the employees' time and thus the State's resources. South Carolina further notes that the DPPA's penalty provisions hang over the States as a potential punishment should they fail to comply with the Act.

We agree with South Carolina's assertion that the DPPA's provisions will require time and effort on the part of state employees, but reject the State's argument that the DPPA violates the principles laid down in either New York or Printz. We think, instead, that this case is governed by our decision in South Carolina v. Baker, 485 U.S. 505 (1988). In Baker, we upheld a statute that prohibited States from issuing unregistered bonds because the law "regulated state activities," rather than "seeking to control or influence the manner in which States regulate private parties." Id. at 514-515. We further noted: "The NGA [National Governor's Association] nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." Ibid.

Like the statute at issue in Baker, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

In Murphy v. NCAA, 138 S. Ct. 1461 (2018), the Supreme Court struck down the entire Professional and Amateur Sports Protection Act (PASPA) as "commandeering" because part of the statute dictated what a state legislature may or may not do by prohibiting states from repealing their bans on sports gambling. Had Congress merely said that States or private parties must refrain from operating sports gambling schemes that would have been constitutional. However, such a statute might have imposed budgetary costs on the federal government to enforce such a ban, and PASPA was passed in part based on assurances it would impose "no cost" on the federal government. That may explain why Congress passed the statute they did. Three Justices argued that part of PASPA did directly regulate private individuals, and that part of the statute should have been allowed to stand. Id. at 1489 (Ginsburg, J., joined by Sotomayor, J., and in part by Breyer, J., dissenting).
§ 8.2 11th Amendment Limits on Federal Legislative Power

1. Historical Development of 11th Amendment Doctrine

A. The Original Natural Law Era: 1789-1873

On February 19, 1793, the Supreme Court held in *Chisholm v. Georgia*\(^{41}\) that federal jurisdiction extended to actions against a state by a citizen of another state, based upon the literal language of Article III, § 2, cl. 1 of the Constitution, which provides for jurisdiction in cases “between a State and Citizens of another State.” The concern that federal courts would have such jurisdiction, particularly in cases involving individuals suing states for debts owed to them by states, as for monies borrowed to help finance the Revolutionary War, had been raised during the ratifying debates at a number of state conventions. The concern was muted, to an extent, by Hamilton in *The Federalist Papers*, published initially during the New York ratifying convention, and by statements of Madison and Marshall at the Virginia ratifying convention, that background principles of state sovereignty would prevent such suits from being brought without the state’s consent in these class of cases. Cases involving state debts were a particularly sensitive issue, since a number of states, including New York, had traditions that the legislatures in those states determined whether debts were owed and should be paid, not courts.\(^ {42}\) The *Chisholm* Court chose to follow the literal text of Article III, concluding that state sovereignty was limited in the new Nation. Even the lone dissent by Justice Iredell did not rest on the state having a constitutional immunity from suit, but only on the ground that Congress had not yet clearly authorized such suits by statute.\(^ {43}\)

Opposition in a number of states to the *Chisholm* opinion led to quick introduction in Congress of a draft for the 11th Amendment. Congress formally took up the issue the following year and approved the 11th Amendment in January, 1794, with state ratification by more than 3/4 of the states by 1795, although President Adams did not issue a proclamation declaring the Amendment ratified until 1798.\(^ {44}\) The 11th Amendment provides: "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."

By its literal text, the 11th Amendment does not apply to actions in federal courts against a state by its own citizens. One reason for this may have been that, at the time, there was no federal question jurisdiction to hear cases in federal court. Thus, the main source of federal court jurisdiction, absent

\(^{41}\) 2 U.S. (Dall.) 419 (1793).


\(^{43}\) *Chisholm*, 2 U.S. at 433-38, 449-50 (Iredell, J., opinion).

admiralty and maritime cases, involved diversity jurisdiction, which the literal text of the 11th Amendment addressed. Regarding such cases, the Court had to address whether the 11th Amendment applied only to cases where a state was a named party to the litigation, or did it also apply to actions against state officials acting on behalf of the state, and thus affecting the state. In *Osborn v. Bank of the United States*, the Court held in 1824 that the 11th Amendment by its terms only applies where the state is a named party. As Chief Justice Marshall noted in *Osborn*, unlike the language in the Constitution granting jurisdiction for cases “affecting Ambassadors [or] other public Ministers and Consuls,” the constitutional text to which the 11th Amendment responds refers only to those cases “in which a State shall be a Party,” suggesting its reach is only to cases where the state is a named party on the record, not where the state is merely “affected” by the litigation.

Because of the lack of federal question jurisdiction, the only cases where a state sovereignty issue would likely be raised before 1875, other than diversity jurisdiction, would be admiralty and maritime cases, cases where the United States was a party, state versus state cases, and the Court’s appellate jurisdiction over state cases involving federal issues. The 11th Amendment, by its literal terms and in court precedents, has never been interpreted to apply to actions by the United States against a state, or in state versus state lawsuits. Actions in admiralty or maritime jurisdiction, such as *United States v. Peters*, or actions as part of the Supreme Court’s appellate jurisdiction, such as *Osborn*, noted above, were typically brought against state officials, not the state directly, and thus the 11th Amendment was held to provide no barrier to suit. Indeed, even where the state was a party on the record of the case, the Marshall Court held in *Cohens v. Virginia* that the 11th Amendment was no barrier to exercise of the Court’s appellate jurisdiction, since the 11th Amendment text only applies to cases “commenced or prosecuted” in the federal courts. Thus, it does not apply to cases initially tried in state courts that reach the Supreme Court through the Court’s appellate jurisdiction.

In addition, “because of the paucity of federal legislation prior to the Civil War, occasions for conflicts in the state courts between state and federal law were few.” Indeed, reflecting the uncontroversial nature of the 11th Amendment before the Civil War, the Constitution for the Confederate States of America, which adopted the United States Constitution with appropriate modifications, such as enshrining slavery, but having a reduced Commerce Clause, merely reproduced the 11th Amendment language without modification, despite the states’ rights bias of Southerners prior to the Civil War. In the few 11th Amendment cases after the Civil War, but before federal question jurisdiction became available in 1875, the Court followed the pre-Civil War

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47 9 U.S. (5 Cranch) 115 (1809).
precedents, which limited the 11th Amendment to diversity cases, and permitted cases against state officials, even where the state was the real party in interest.50

B. The Formalist Era: 1873-1937

Once federal question jurisdiction became available in 1875, as discussed at § 2.1.4 nn.12-14, the potential for a greater number of cases against states in federal court increased. In one set of cases, the formalist-era court limited the principle of Osborn by refusing to apply it, in cases such as Louisiana v. Jumel, Haygood v. Southern, and In re Ayers,51 to cases where a state official was the named party in the lawsuit, but the state was the real party to the contract. Over the dissent, among others, of Justice Harlan, who followed the traditional natural law decisionmaking style, the majority of the Court dismissed the lawsuits based on the 11th Amendment, admitting that the decisions were in conflict with Osborn. In 1890, in Hans v. Louisiana,52 the Court held that the 11th Amendment bars actions in federal courts against a state by its own citizens, despite the literal language of the 11th Amendment only focusing on diversity jurisdiction. The Court based its decision on its view that the specific intent of the framers and ratifiers of the 11th Amendment was to provide a wide range of state sovereign immunity.53 The Hans doctrine is also consistent with the conservative predisposition, discussed at § 8.1.1(E) n.30, shared by formalist-era Courts, in favor of states’ rights.

C. Modern 11th Amendment Doctrine: 1937-Present

Subsequent to Hans, the Supreme Court held that the principle of sovereign immunity applied to suits against states brought in federal courts by federal corporations, foreign nations, Indian tribes, or suits in admiralty.54 The Court also held that the 11th Amendment applies to actions involving states, even if a federal court might otherwise apply the doctrine of pendent jurisdiction.55 The 11th Amendment also applies to actions brought in administrative proceedings, as well as court cases.56

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50 See generally id. at 1968-70, discussing, inter alia, Davis v. Gray, 83 (16 Wall.) 203 (1872); Board of Liquidation v. McComb, 92 U.S. 531 (1875).

51 See In re Ayers, 123 U.S. 443 (1887); Haygood v. Southern, 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1883).

52 134 U.S. 1, 14-15 (1890).

53 Evidence for and against Hans was reviewed in great depth in Alden v. Maine. 527 U.S. 706, 715-27 (1999); id. at 761-94 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

54 See id. at 728, and cases cited therein.


In addition, in *Alden v. Maine*, excerpted at § 8.3, the Court held that the principles of sovereign immunity which underlie the 11th Amendment require that states cannot be sued by individuals in state courts for violating federal law, as well as barring suits in federal courts.

### 2. Limits on 11th Amendment Immunity

One issue that has been much litigated is the question of what limits to place upon 11th Amendment immunity. In general, conservative formalists and conservative Holmesians, favoring states’ rights, have tended to read the 11th Amendment state sovereignty immunity principle broadly. Liberal Holmesians and liberal instrumentalists have tended to try to limit the 11th Amendment in order to provide broad federal protection of individual rights. The natural law approach responds to the two competing tensions: the structural “dual theory of sovereignty” supports a broader view of the 11th Amendment, while the actual text of the 11th Amendment supports a narrower view.

Certain principles are clear. By unequivocal expression or conduct, such as removing a case to federal court after the state has waived sovereign immunity in its own state courts, a state has waived 11th Amendment immunity and consented to be sued in federal court. Whether such removal waives aspects of state sovereign immunity if the state had not consented to be sued in its own state courts is not clear.\(^{57}\) Congress can make waiver of the immunity a condition of participating in a

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\(^{57}\) *See Sossamon v. Texas*, 131 S. Ct. 1651 (2011) (state’s acceptance of federal funds did not waive state immunity when the federal statute only authorized “appropriate relief” against the states and this did not constitute unequivocal consent to be sued for money damages); *Vas-Cath, Inc. v. Curators of the University of Missouri*, 473 F.3d 1376 (Fed. Cir. 2007) (state university waived immunity by voluntarily participating in federal administrative forum); *Lapides v. Board of Regents of Univ. of Geo.*, 535 U.S. 613 (2002) (11th Amendment immunity waived by removing case to federal court where state consented to be sued in its own state courts); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005) (state always waives immunity from suit in federal courts when it removes a case to federal court, whether or not it consented to suit in state court, although state may still argue it did not waive immunity from liability for damages); *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005) (sovereign immunity not waived when state removes suit to a federal court that it had not consented to in state court).
federal program or acting in any area that Congress can control. Additionally, an attorneys’ fee in a civil rights case is ancillary and not barred by the 11th Amendment.58 During the deference-to-
government Holmesian era, in 1945, the Court held that states could litigate a case on the merits, and yet not waive the immunity defense, but hold it in reserve. That doctrine was rejected in the modern natural law era in Lapides v. Board of Regents of the University System of Georgia.59

The modern Court has reaffirmed Chief Justice Marshall’s view that because the 11th Amendment refers to cases “commenced or prosecuted” in the federal courts, it does not apply to cases initially tried in state courts that reach the Supreme Court through the Court’s appellate jurisdiction.60 Regarding admiralty and maritime jurisdiction, while in theory the 11th Amendment can be invoked in such cases given Court precedents after Hans, the Court has limited this principle by holding, for example, that the 11th Amendment does not bar an in rem action for a wreckage, nor an in rem action where the state is not in possession of the property, since in those cases the action is not in personam against the state, but in rem for the property. Regular 11th Amendment principles apply for in personam admiralty actions.61 Based in part on bankruptcy proceedings typically being viewed as in rem actions for monies in the estate, 11th Amendment immunity was held in 2006 not to apply in bankruptcy proceedings, despite a plurality of the Court’s conclusion, in 1989, that the federal bankruptcy act does not clearly express an intent to abrogate 11th Amendment immunity.62

Based on its literal text, a formalist-era Court held in Lincoln County v. Luning63 that the 11th Amendment immunity, whatever its breadth, only applies to the state as such. It does not apply to counties, cities, or other municipalities within the state. While that doctrine has been reaffirmed many times, the Court has held in modern times, reflecting a non-formalist, practical approach, that


60 See McKesson Corp. v. Division of Alcohol Beverages and Tobacco, Dep’t of Business Regulation of Florida, 496 U.S. 18, 26-31 (1990).


63 Lincoln County v. Luning, 133 U.S. 529 (1890).
where there is sufficient involvement of the state in local action, so that the relief would run in essence against the state, then 11th Amendment immunity applies.64

This aspect of 11th Amendment doctrine is in conflict with holdings under the 14th Amendment Due Process and Equal Protection Clauses, where “State” binds counties, cities, or municipalities under the view they are creatures of the state Constitutions. This doctrine has led to a confusing line of cases trying to determine if local agencies, boards, or officials are properly to be viewed as state actors, to which 11th Amendment immunity would apply, or county, city, municipality, or other kind of non-state actors, to which 11th Amendment immunity does not apply. In making these decisions, the Court asks, as in McMillian v. Monroe County,65 whether the particular individual is making a final policy decision on behalf of the local entity, or making a policy decision on behalf of the state.

In reaching this decision, state law is relevant, although the decision is ultimately one of federal law.

The decisions in these cases tend to be very fact specific, so that, for example, local sheriffs can be viewed as state policymakers in some states for some actions, as for enforcing state laws, but not in other states, or for other actions.66 State universities are usually held to be state actors,67 although there are cases based on state statutes granting the state university substantial independence from state control where the state university was held not entitled to 11th Amendment immunity.68 The Court has held that the St. Louis Board of Police Commissioners was not a state policy body, based on their independent decisionmaking, even though the state Governor appointed a majority of its members.69 The Court has noted that “the question of whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued.”70 But


67 See, e.g., Xechem International, Inc. v. University of Texas M.D. Anderson Cancer Center, 382 F.3d 1324 (Fed. Cir. 2004); Clay v. Texas Women’s Univ., 728 F.2d 714 (5th Cir. 1984); Shawer v. Indiana Univ. of Penn., 602 F.2d 1161 (3d Cir. 1979). So are State Bar Associations. See Hirsh v. Justices of the Supreme Court, 67 F.3d 708 (9th Cir. 2014) (State Bar of California arm of the state and thus entitled to state immunity when sued by disappointed Bar examination test-taker).


that is just one factor, with nature of state control over decisionmaking, the manner of appointment (state/local election or appointment), and how state law characterizes the position, also relevant.\footnote{See John R. Pagan, Eleventh Amendment Analysis, 39 Ark. L. Rev. 447, 461-62 (1986). See also Ali v. Carnegie Institute of Washington, 2017 WL 1349280 (Fed. Cir. 2017) (patent suit dismissed; one of two existing patent holders a professor at public University of Massachusetts, who is indispensable party having sovereign immunity, even though other professor at private Carnegie Institute); Pennsylvania Higher Educ. Assistance Agency v. Pele, 628 Fed. App’x 870 (4th Cir. 2017) (higher education student loan association is not an arm of the state for purposes of state immunity); United States v. University of Massachusetts, Worcester, 812 F.3d 35 (1st Cir. 2016) (student loan association is arm of the state); United States ex rel. Lesinski v. South Florida Water Management Dist., 739 F.3d 598 (11th Cir. 2014) (local water district is arm of the state); Lake v. Skelton, 840 F.3d 1334 (11th Cir. 2016) (2-1 panel held county sheriff is arm of the state in lawsuit over religious rights and dietary matters, since duty to feed inmates is “directly assigned by the state.”).}

An important limit on the 11th Amendment is the principle of Osborn, stated in 1824, that state officials can be sued, even though states cannot. This principle, as limited in 1887 by In re Ayers, which held that 11th Amendment immunity exists if the state is the real party in interest, was restated by the post-Hans formalist-era Court in 1908 in Ex parte Young.\footnote{209 U.S. 123 (1908).} There, the Court held that federal courts may enjoin unconstitutional acts by state officials who are connected with enforcing a statute invalid on its face or as applied. The Court said local officials were "stripped" of their public character when so acting. Under Ex parte Young, state officials may be ordered to pay benefits that would have been denied by an invalid state law, and may be ordered to comply with a consent decree entered into by state officials, as held in Frew ex rel. Frew v. Hawkins.\footnote{540 U.S. 431, 437-42 (2004). The Court held in Virginia Office for Protection and Advocacy v. Stewart, 131 S. Ct. 1632, 1638 (2011), that the Ex parte Young exception applies not only when the state official is sued by a private citizen, but is sued by an independent state agency official. Chief Justice Roberts, joined by Justice Alito dissented, stating, “This is a matter for the State to sort out, not a federal judge.” Id. at 1650-51 (Roberts, C.J., joined by Alito, J., dissenting).} However, Ex parte Young is limited by principles of executive official qualified immunity, discussed at § 10.4.3(A), and by Edelman v. Jordan,\footnote{415 U.S. 651 (1974).} where the Court held that, in an action against state officials, retroactive relief from state is not allowed, e.g., payment of state funds for past violations.

3. Congressional Power to Abrogate State Immunity

Another limit on the 11th Amendment was discussed in 1976 in Fitzpatrick v. Bitzer.\footnote{427 U.S. 445 (1976).} In Fitzpatrick, the Court held that by "unmistakably clear language" Congress may use its § 5
enforcement power in the 14th Amendment to provide for private remedies, including damage awards against a state that would otherwise be barred by *Edelman v. Jordan*, for persons injured by state violations of the 14th Amendment. This is so because the 14th Amendment, ratified after the 11th Amendment, was held to trump any 11th Amendment immunity. Because the intent must be “unmistakably clear,” the evidence must appear in the text of the statute, not legislative history.\(^{76}\) Applying this test of “unmistakably clear language,” the Court has held that 42 U.S.C. § 1983 does not manifest an intent to authorize retrospective relief.\(^{77}\)

In 1989, the Court extended *Fitzpatrick*'s “clear language” exception to cases involving not merely congressional power to act under the 14th Amendment, but cases under the Constitution’s original Commerce Clause. In *Pennsylvania v. Union Gas Co.*,\(^{78}\) the Court held 5-4 that Congress can create federal court actions against states for damages acting under the Commerce Clause. Reflecting an instrumentalist approach, Justice Brennan, with Justices Marshall, Blackmun and Stevens forming a plurality, wrote that Congress could authorize law suits in federal court against states on federal question grounds. Justice Brennan's reasoning was that when the states ratified the Constitution they consented to suits against them in federal courts based on congressionally created causes of action. The 11th Amendment did not deprive Congress of this power because it merely made clear that Article III itself did not automatically sweep away all aspects of state sovereign immunity. Justice Brennan said that *Hans v. Louisiana* was not to the contrary since *Hans* did not specifically deal with Congress' authority under either the 14th Amendment or the Commerce Clause. This result was supported by the fifth vote of liberal Holmesian Justice White, who wrote a concurring opinion which said he disagreed with much of Brennan's reasoning. Without providing his own reasoning, Justice White nonetheless joined in the result of the plurality opinion.\(^{79}\) This is consistent with the liberal Holmesian tendency, discussed at § 9.1.1 n.14, to defer to congressional exercises of power.

By 1996, instrumentalist Justices Brennan, Marshall, and Blackmun had left the Court, as had Justice White. The dissenters in *Union Gas*, joined by newly appointed formalist Justice Thomas, voted to overrule *Union Gas* in *Seminole Tribe of Florida v. Florida*,\(^{80}\) excerpted below. For the Court, Chief Justice Rehnquist said that none of the policies underlying *stare decisis* required continued adherence to *Union Gas*. It was always of questionable precedent value, largely because a majority had expressed disagreement with the rationale of the plurality. The result and rationale departed from established understanding of the 11th Amendment and undermined the accepted function of Article III, since never before had the Court suggested that the bounds of Article III could be expanded by Congress operating under any constitutional provision except the

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\(^{78}\) 491 U.S. 1, 13-23 (1989).

\(^{79}\) Id. at 57 (White, J., concurring in the judgment in part and dissenting in part).

\(^{80}\) 517 U.S. 44 (1996).
14th Amendment. Justice Rehnquist also noted that the Governor of Florida could not be sued for prospective injunctive relief under the doctrine of *Ex parte Young* because Congress here had prescribed a detailed remedial scheme for enforcement of a statutorily created right. It would be inappropriate for the court to supplement that scheme with one created by the judiciary, citing *Schweiker v. Chilicky*.

Justice Stevens, dissenting, said the 11th Amendment applies only to suits premised on diversity jurisdiction. He read *Hans* to hold only that federal courts should decline to entertain suits against unconsenting states as a matter of federal common law. He was concerned that the majority's opinion would prevent Congress from providing a federal forum for a broad range of actions against states. Justice Souter, dissenting, with Justices Ginsburg and Breyer, also took issue with the holding in *Hans* that because a state could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, a state must enjoy the same protection in a suit by one of its own citizens. Beyond that, he contended that *Hans* had misread statements in *The Federalist Papers* and, in any event, *Hans* did not consider whether Congress could abrogate the state's sovereign immunity by statute, since *Hans* involved a case concerning whether the state of Louisiana's action violated the Contract Clause. Justice Souter then explored historical materials to show that those framers who expected common-law immunity to survive ratification were focused on diversity jurisdiction, not immunity of a state against the general federal question jurisdiction of the national courts.

Since 1996, a majority of the Justices have adhered to *Seminole Tribe*. Indeed, the practical impact of *Seminole Tribe* has been extended by several cases that have limited Congress’ power to abrogate state sovereign immunity by use of Congress’ § 5 power to enforce the 14th Amendment. Under *Boerne v. Flores*, excerpted at § 7.4, Congress’ power under § 5 is limited to cases where the Court would find a violation of equal protection or due process. Isolated violations by a state of federal law passed pursuant to Article I, § 8 does not constitute such a violation; only where there is a “pattern or practice” of state violations is there a credible argument that the state is denying persons equal protection of the laws by their violations of federal laws. Thus, in many cases, states will have 11th Amendment immunity and cannot be sued by individuals for violations of federal law valid under Article I, § 8 and the 10th Amendment as interpreted in *Garcia*.

A number of 5-4 decisions have been reached with respect to federal statutes that purported to subject states, including state universities and university researchers, to federal court jurisdiction in damage actions for infringement of patents or trademarks, under the Age Discrimination in

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81 *Id.* at 57-70, 74, citing *Schweiker*, 487 U.S. 412 (1988).

82 *Id.* at 100-85 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).


84 See, e.g., United States v. Georgia, 546 U.S. 151, 155, 158-59 (2006) (paraplegic inmate can sue state if “grave” and “serious” allegations about conditions of confinement violate due process).
Employment Act, or under the Americans with Disabilities Act. 85 In two recent cases, however, Congress’ power to abrogate state sovereign immunity under the 14th Amendment did prevail because a bare majority of the court found such a “pattern or practice” to exist. This occurred in Nevada Dep’t of Human Resources v. Hibbs, 86 a case dealing with the family leave provisions of the Family and Medical Leave Act, and in Tennessee v. Lane, 87 excerpted below, dealing with the American with Disabilities Act regulating access of disabled persons to state courthouses. Despite Hibbs, a 5-4 Court held in Coleman v. Court of Appeals of Maryland 88 that there was not a sufficient pattern of state discrimination under the self-care provision of the Family and Medical Leave Act, as opposed to the family leave provision in Hibbs, and thus Congress could not use its enforcement power to authorize money damage lawsuits against the states under the Act’s self-care provisions.

Seminole Tribe of Florida v. Florida  
517 U.S. 44 (1996)

Chief Justice REHNQUIST delivered the opinion of the Court.

The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U.S.C. § 2710(d)(1)(c). The Act, passed by Congress under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold notwithstanding Congress’ clear intent to abrogate the States’ sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of Ex parte Young, 209 U.S. 123 (1908), may not be used to enforce § 2710(d)(3) against a state official.


88 132 S. Ct. 1327 (2012); id. at 1339 (Ginsburg, J., joined by Breyer, J., and joined by Sotomayor & Kagan, JJ., except as to footnote 1, dissenting).
The Eleventh Amendment provides: "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."

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991). That presupposition, first observed over a century ago in Hans v. Louisiana, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," id., at 13 (emphasis deleted), quoting The Federalist No. 81, p. 487 C. Rossiter ed. 1961) (A. Hamilton). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States. Hans, [134 U.S. 1 (1890)], at 15.

In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expressed its intent to abrogate the immunity," Green v. Mansour, 474 U.S. 64, 68 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power," id. The Court then noted that "we agree with the parties, with the Eleventh Circuit in the decision below, 11 F.3d at 1024, and with virtually every other court that has confronted the question that Congress has in § 2710(d)(7) provided an "unmistakably clear" statement of its intent to abrogate" state sovereign immunity under this Act.

Our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate.pursuant to a constitutional provision granting Congress the power to abrogate? See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 452-456 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In Fitzpatrick, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. Id., at 455. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See id., at 453 (internal quotation marks omitted). We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

In only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld. In Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), a plurality of the Court found that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." 491 U.S. at 19-20. Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he "[d]
not agree with much of [the plurality's] reasoning." Id., at 57 (opinion concurring in judgment in part and dissenting in part).

The Court in Union Gas reached a result without an expressed rationale agreed upon by a majority of the Court. We have already seen that Justice Brennan's opinion received the support of only three other Justices. See Union Gas, 491 U.S. at 5 (Marshall, Blackmun, and Stevens, JJ., joined Justice Brennan). Of the other five, Justice White, who provided the fifth vote for the result, wrote separately in order to indicate his disagreement with the plurality's rationale, id., at 57 (opinion concurring in judgment and dissenting in part), and four Justices joined together in a dissent that rejected the plurality's rationale, id., at 35-45 (Scalia, J., dissenting, joined by Rehnquist, C J., and O'Connor and Kennedy, JJ.). Since it was issued, Union Gas has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision. See, e.g., Chavez v. Arte Publico Press, supra, at 543-545 ("Justice White's concurrence must be taken on its face to disavow" the plurality's theory); 11 F.3d at 10271 (Justice White's "vague concurrence renders the continuing validity of Union Gas in doubt").

The plurality's rationale also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in Hans. See Union Gas, supra, at 36 ("If Hans means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all") (Scalia, J., dissenting). It was well established in 1989 when Union Gas was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit . . . ." And our decisions since Hans had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III," Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-98 (1984); see Union Gas, supra, at 38, ("The entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . . ") (Scalia, J., dissenting) (quoting Ex parte New York, 256 U.S. 490, 497 (1921)).

In overruling Union Gas today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) ("When the design of a Government
program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in Ex parte Young, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young.

Here, Congress intended § 2710(d)(3) to be enforced against the State in an action brought under § 2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3). For example, where the court finds that the State has failed to negotiate in good faith, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue. By contrast with this quite modest set of sanctions, an action brought against a state official under Ex parte Young would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions. If § 2710(d)(3) could be enforced in a suit under Ex parte Young, § 2710(d)(7) would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under Ex parte Young.

2710(d)(7) stands in contrast to the statutes cited by the dissent as examples where lower courts have found that Congress implicitly authorized suit under Ex parte Young. Compare 28 U.S.C. § 2254(e) (federal court authorized to issue an "order directed to an appropriate State official"); 42 U.S.C. § 11001 (1988 ed.) (requiring "the Governor" of a State to perform certain actions and holding "the Governor" responsible for nonperformance); 33 U.S.C. § 1365(a) (authorizing a suit against "any person" who is alleged to be in violation of relevant water pollution laws). Similarly the duty imposed by the Act – to "negotiate . . . in good faith to enter into" a compact with another sovereign – stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers. Cf. State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) (Governor of Kansas may negotiate but may not enter into compact without grant of power from legislature).

The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court. The narrow exception to the Eleventh Amendment provided by the Ex parte Young doctrine cannot be used to enforce § 2710(d)(3) because Congress enacted a remedial scheme, § 2710(d)(7), specifically designed for the enforcement of that right. The Eleventh Circuit's dismissal of petitioner's suit is hereby affirmed.
JUSTICE STEVENS, dissenting.

This case is about power – the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the entire Court – including Justice Iredell whose dissent provided the blueprint for the Eleventh Amendment – assumed that Congress had such power. In *Hans v. Louisiana*, 134 U.S. 1 (1890) – a case the Court purports to follow today – the Court again assumed that Congress had such power. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24 (1989) (Stevens, J., concurring), the Court squarely held that Congress has such power. In a series of cases beginning with *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-239 (1985), the Court formulated a special "clear statement rule" to determine whether specific Acts of Congress contained an effective exercise of that power. Nevertheless, in a sharp break with the past, today the Court holds that with the narrow and illogical exception of statutes enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, Congress has no such power.

The importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good-faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.

There may be room for debate over whether, in light of the Eleventh Amendment, Congress has the power to ensure that such a cause of action may be enforced in federal court by a citizen of another State or a foreign citizen. There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear.

For these reasons, as well as those set forth in Justice Souter's opinion, I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. Although the Court invokes the Eleventh Amendment as authority for this proposition, the only sense in which that amendment might be claimed as pertinent here was tolerantly phrased by Justice Stevens in his concurring opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989). There, he explained how it has come about that we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134 U.S. 1 (1890). Justice Stevens saw in that second Eleventh Amendment no bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by
individuals against a State, and I can only say that after my own canvass of the matter I believe he was entirely correct in that view, for reasons given below. His position, of course, was also the holding in *Union Gas*, which the Court now overrules and repudiates.

It is useful to separate three questions: (1) whether the States enjoyed sovereign immunity if sued in their own courts in the period prior to ratification of the National Constitution; (2) if so, whether after ratification the States were entitled to claim some such immunity when sued in a federal court exercising jurisdiction either because the suit was between a State and a nonstate litigant who was not its citizen, or because the issue in the case raised a federal question; and (3) whether any state sovereign immunity recognized in federal court may be abrogated by Congress.

The answer to the first question is not clear, although some of the Framers assumed that States did enjoy immunity in their own courts. The second question was not debated at the time of ratification, except as to citizen-state diversity jurisdiction; there was no unanimity, but in due course the Court in *Chisholm v. Georgia* 2 U.S. 419 (1793), answered that a state defendant enjoyed no such immunity. As to federal-question jurisdiction, state sovereign immunity seems not to have been debated prior to ratification, the silence probably showing a general understanding at the time that the States would have no immunity in such cases.

The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants. I will explain why the Eleventh Amendment did not affect federal-question jurisdiction, a notion that needs to be understood for the light it casts on the soundness of *Hans*'s holding that States did enjoy sovereign immunity in federal-question suits. The *Hans* Court erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal-question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens. The error of *Hans*'s reasoning is underscored by its clear inconsistency with the Founders' hostility to the implicit reception of common-law doctrine as federal law, and with the Founders' conception of sovereign power as divided between the States and the National Government for the sake of very practical objectives.

The Court's answer today to the third question is likewise at odds with the Founders' view that common law, when it was received into the new American legal system, was always subject to legislative amendment. In ignoring the reasons for this pervasive understanding at the time of the ratification, and in holding that a nontextual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again.

Beyond this third question that elicits today's holding, there is one further issue. To reach the Court's result, it must not only hold the *Hans* doctrine to be outside the reach of Congress, but must also displace the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that an officer of the Government may be ordered prospectively to follow federal law, in cases in which the Government may not itself be sued directly. None of its reasons for displacing *Young*'s jurisdictional doctrine withstand scrutiny.
Ex parte Young restored the old simplicity by complementing In re Ayers with the principle that state officers never have authority to violate the Constitution or federal law, so that any illegal action is stripped of state character and rendered an illegal individual act. Suits against these officials are consequently barred by neither the Eleventh Amendment nor Hans immunity. The officer's action "is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional . . . . The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Ex parte Young, 209 U.S. at 159-160.

The decision in Ex parte Young, and the historic doctrine it embodies, thus plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a "fiction," the long history of its felt necessity shows it to be something much more estimable, as we may see by considering the facts of the case. "Young was really and truly about to damage the interest of plaintiffs. Whether what he was about to do amounted to a legal injury depended on the authority of his employer, the state. If the state could constitutionally authorize the act then the loss suffered by plaintiffs was not a wrong for which the law provided a remedy . . . . If the state could not constitutionally authorize the act then Young was not acting by its authority." Orth, Judicial Power of the United States, at 133. The doctrine we call Ex parte Young is nothing short of "indispensable to the establishment of constitutional government and the rule of law." C. Wright, Law of Federal Courts 292 (4th ed. 1983). See also Chemerinsky, Federal Jurisdiction, at 393.

Tennessee v. Lane

Justice STEVENS delivered the opinion of the Court.

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." § 12132. The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment.

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain
access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, “[a]s of 1979, most States . . . categorically disqualified ‘idiots' from voting, without regard to individual capacity.” [FN5 Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 464, and n.14 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979)).] The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. [Citations omitted] The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, e.g., Jackson v. Indiana, 406 U.S. 715 (1972); the abuse and neglect of persons committed to state mental health hospitals, Youngberg v. Romeo, 457 U.S. 307 (1982); and irrational discrimination in zoning decisions, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. [Citations omitted].

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40-41, 48 (1988). And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in Garrett, O.T.2000, No. 99-1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Oct. 12, 1990).

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: “[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” 42 U.S.C. § 12101(a)(3) (emphasis added). This finding, together
with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

Chief Justice REHNQUIST, with whom Justice KENNEDY and Justice THOMAS join, dissenting.

With respect to the due process “access to the courts” rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is nothing in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trial. [FN4 Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane's right to be present at his trial; indeed, it made affirmative attempts to secure that right.]

Lacking any real evidence that Congress was responding to actual due process violations, the majority relies primarily on three items to justify its decision: (1) a 1983 U.S. Civil Rights Commission Report showing that 76% of “public services and programs housed in state-owned buildings were inaccessible” to persons with disabilities; (2) testimony before a House subcommittee regarding the “physical inaccessibility” of local courthouses; and (3) evidence submitted to Congress' designated ADA task force that purportedly contains “numerous examples of the exclusion of persons with disabilities from state judicial services and programs.”

On closer examination, however, the Civil Rights Commission's finding consists of a single conclusory sentence in its report, and it is far from clear that its finding even includes courthouses. The House subcommittee report, for its part, contains the testimony of two witnesses, neither of whom reported being denied the right to be present at constitutionally protected court proceedings. Indeed, the witnesses' testimony, like the U.S. Commission on Civil Rights Report, concerns only physical barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons. Cf. [FN4], supra (describing alternative means of access offered to respondent Lane).

Based on the majority's description, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in Garrett, O.T.2000, No. 99-1240, which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternative means of access. This evidence, moreover, was submitted not to Congress, but only to the task force, which itself made
no findings regarding disabled persons' access to judicial proceedings. Cf. Garrett, 531 U.S., at 370-371 (rejecting anecdotal task force evidence for similar reasons). As we noted in Garrett, “had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act’s legislative findings.” Id., at 371. Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts.

Justice SCALIA, dissenting.

I would replace “congruence and proportionality” with another test – one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power “to enforce, by appropriate legislation,” the other provisions of the Fourteenth Amendment. U.S. Const., Amdt. 14 (emphasis added). Morgan notwithstanding, one does not, within any normal meaning of the term, “enforce” a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, “enforce” a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit – even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not “enforce” the right of access to the courts at issue in this case, see ante, at 1993, by requiring that disabled persons be provided access to all of the “services, programs, or activities” furnished or conducted by the State, 42 U.S.C. § 12132. That is simply not what the power to enforce means – or ever meant. The 1860 edition of Noah Webster’s American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined “enforce” as: “To put in execution; to cause to take effect; as, to enforce the laws.” Id., at 396. See also J. Worcester, Dictionary of the English Language 484 (1860) (“To put in force; to cause to be applied or executed; as, ‘To enforce a law’”). Nothing in § 5 allows Congress to go beyond the provisions of the Fourteenth Amendment to proscribe, prevent, or “remedy” conduct that does not itself violate any provision of the Fourteenth Amendment. So-called “prophylactic legislation” is reinforcement rather than enforcement.

The major impediment to the approach I have suggested is stare decisis. A lot of water has gone under the bridge since Morgan, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of Morgan.

Thus, principally for reasons of stare decisis, I shall henceforth apply the permissive McCulloch standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See Hibbs, 538 U.S., at 741-743 (Scalia, J., dissenting); Morrison, 529 U.S., at 626-627; Morgan, 384 U.S., at 666-667, 669, 670-671 (Harlan, J., dissenting). I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See Morrison, supra, at 625-626. And I would not, of course, permit any congressional measures that violate other provisions of the Constitution.
§ 8.3 Additional State Sovereignty Limits: The Case of Alden v. Maine

In 1999, the Court held in Alden v. Maine that states have immunity from being sued not only in federal court, but also in state court, with respect to suits by individuals against the state, unless some valid waiver of immunity is obtained.

Alden v. Maine
527 U.S. 706 (1999)

Justice KENNEDY delivered the opinion of the Court.

[Ed.: Petitioners, a group of probation officers, filed suit against their employer, the State of Maine, alleging the State had violated the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA), the same statute at issue in Garcia, excerpted at § 8.1.1(D), seeking compensation and liquidated damages. The state trial court dismissed the suit on the basis of sovereign immunity, and the Maine Supreme Judicial Court affirmed. 715 A.2d 172 (1998).]

We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.

The Eleventh Amendment makes explicit reference to the States' immunity from suits “commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as “Eleventh Amendment immunity.” The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts. See Chisholm v. Georgia, 2 Dall. 419, 437-446 (1793 (Iredell, J., dissenting) (surveying English practice); cf. Nevada v. Hall, 440 U.S. 410, 414 (1979) (“The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity”). In reciting the prerogatives of the Crown, Blackstone – whose works constituted the preeminent authority on English law for the founding generation – underscored the close and necessary relationship understood to exist between sovereignty and immunity from suit. “And, first, the law ascribes to the king the attribute of
sovereignty, or pre-eminence. . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power . . . .” 1 W. Blackstone, Commentaries on the Laws of England 234-235 (1765).

The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity. One assurance was contained in The Federalist No. 81, written by Alexander Hamilton: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.”

At the Virginia ratifying convention, James Madison echoed this theme: “Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. . . . It appears to me that this [clause] can have no operation but this – to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.” 3 Debates on the Federal Constitution 533 (J. Elliot 2d ed. 1854) (hereinafter Elliot's Debates).

When Madison's explanation was questioned, John Marshall provided immediate support: “With respect to disputes between a state and citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.”

Despite the persuasive assurances of the Constitution's leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms, this Court held, just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent. Chisholm v. Georgia, 2 [U.S. (2 Dall.)] 419 (1793). Given the outraged reaction to Chisholm, as well as Congress' repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment . . . .

The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush.
Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court's principal rationale for today's result . . . turns on history: was the . . . conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791)?

The answer is certainly no. There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common law power defeasible, like other common law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it.

At the Constitutional Convention, the notion of sovereign immunity, whether as natural law or as common law, was not an immediate subject of debate, and the sovereignty of a State in its own courts seems not to have been mentioned. This comes as no surprise, for although the Constitution required state courts to apply federal law, the Framers did not consider the possibility that federal law might bind States, say, in their relations with their employees. In the subsequent ratification debates, however, the issue of jurisdiction over a State did emerge in the question whether States might be sued on their debts in federal court, and on this point, too, a variety of views emerged and the diversity of sovereign immunity conceptions displayed itself.

The only arguable support for the Court's absolutist view that I have found among the leading participants in the debate surrounding ratification was the one already mentioned, that of Alexander Hamilton in The Federalist No. 81 [quoted by the majority]. Hamilton chose his words carefully, and he acknowledged the possibility that at the Convention the States might have surrendered sovereign immunity in some circumstances . . . . [Ed.: hence the concern over the debt cases.]

At the furthest extreme from Hamilton, James Wilson made several comments in the Pennsylvania Convention that suggested his hostility to any idea of state sovereign immunity. . . . “Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare.” [Chisholm, 2 U.S. (2 Dall.)] at 443. While this statement did not specifically address sovereign immunity, it expressed the major premise of what would later become Justice Wilson's position in Chisholm: that because the people, and not the States, are sovereign, sovereign immunity has no applicability to the States.
Practically speaking, of course, the broad state immunity granted under current doctrine is still limited by the fact that the federal government can always sue states to enforce compliance with federal law; individuals can often sue under *Ex parte Young* for injunction relief; the federal government can create incentives for state compliance under its Spending Clause power; and states can choose voluntarily to comply with federal law, as did Maine after *Alden v. Maine*, where Maine began to pay its workers consistent with federal minimum wage and overtime laws, despite the lawsuit seeking damages for prior violations being dismissed on state sovereign immunity grounds.\(^{89}\)

For discussion of the historical background surrounding the 11th Amendment and state sovereign immunity doctrine, *see* Charles D. Kelso & R. Randall Kelso, *The Path of Constitutional Law* Ch. §§ 12.3.3 nn.129-43 & 17.2.4.3 (2007) ([http://libguides.stcl.edu/kelsomaterials](http://libguides.stcl.edu/kelsomaterials)) (noting that while 17th century theories of Hobbes & Locke, with only two branches of government, the legislative and executive, with courts under the executive branch, support strong sovereign immunity for the King, as reflected in Blackstone, 18th century theory of Montesquieu, with a tripartite system of legislative, executive, and independent judicial branches, and full statements and actions in context of Hamilton, Madison, and Marshall, support Justice Souter’s view in *Alden v. Maine*).

### § 8.4 Additional Textual Limits on Federal Power

Article I, § 9 of the Constitutions contains eight clauses providing for specific textual limitations on federal power. These clauses tend to be clear in their meaning, and thus have not provided the source for many constitutional cases. These eight provisions provide:

1. No prohibiting international slave trade prior to 1808, discussed at § 16.4.2 nn.47-49;
2. Writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, addressed at §§ 12.4.1 nn.38-42, 12.4.2 nn.44-52 & 12.4.3 nn.65-67;
3. No bill of attainder or ex post facto law shall be passed, addressed at § 16.2.2 & 16.2.3;
4. No capitation, or other direct tax shall be laid unless in proportion to census or enumeration, amended by the 16th Amendment, addressed at § 7.1.1 n.6;
5. No tax or duty, shall be laid on articles exported from any state;
6. No preference shall be given to any regulation of commerce or revenue to the ports of one state over another, nor shall vessels bound from one state have to pay duties to enter or leave any port of another;
7. No money shall be drawn from the treasury except by appropriation made by law, and a regular accounting shall be published of all money spent from time to time, although who would have standing to bring such a case is unclear; and
8. No title of nobility shall be granted by the United States, and no person holding office may accept any present, gift, or title from any King, Prince, or foreign state without approval of Congress.

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PART III: FEDERAL EXECUTIVE VERSUS LEGISLATIVE POWER

CHAPTER 9: OVERVIEW OF EXECUTIVE VERSUS LEGISLATIVE POWER

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§ 9.1 Introduction to Executive versus Legislative Power

1. General Principles Regarding the Separation of Powers

The separation of powers doctrine combines two ideas. The first is that the Constitution identifies three distinct governmental functions: the legislative power, a power to make law; the executive power, a power to apply law or call for its application, subject to judicial review; and the judicial power, a power to declare authoritatively what the law is and to approve its application in specific cases. The second idea is that no one branch of government can exercise the central power of any other branch or substantially disrupt the operations of that branch. Thus, Congress may not impose core executive or administrative duties, that is, duties of a non-judicial nature, on judges holding office under Article III.1 Similarly, Congress cannot delegate to executive or judicial officers the legislative power to make rules without also creating standards by which the power is to be used.2

Lying behind the separation of powers doctrine is the notion of checks and balances. Checks and balances doctrine has two main principles. First, each branch must be given sufficient power to discharge its operations efficiently. Second, to prevent tyranny by any one branch, no branch should have unlimited power. James Madison wrote in The Federalist Papers No. 51, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”3

Designed in part to promote the goal of efficiency, the separation of powers doctrine does not prohibit one branch from ever exercising a power of the other branches. Indeed, the Constitution

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1 See, e.g., United States v. Ferreira, 54 U.S. 40, 49-51 (1851); Hayburn’s Case, 2 U.S. 408, 410 n.* (1792).


3 The Federalist Papers No. 51 (Madison).
expressly authorizes certain blends. For example, Congress exercises a kind of judicial power when it engages in impeachment proceedings. The President exercises a kind of legislative power when vetoing a bill, and a kind of judicial power when granting a pardon. Courts exercised executive powers when, pursuant to the Appointments Clause, they appointed independent counsels under the Ethics in Government Act of 1978, as addressed in *Morrison v. Olson*, excerpted at § 10.1. Justice Powell, concurring in *INS v. Chadha*, and quoting from Justice Jackson, said that the Constitution contemplates that "practice will integrate the dispersed powers into a workable government."

In one of the most notable statements on the separation of powers, Justice Story said in 1833 in his book *Commentaries on the Constitution of the United States*: “[The separation of powers doctrine] is not meant to affirm, that [the three branches of government] must be kept wholly separate and distinct, and have no common link or connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments. . . . [A]s a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers."5

Modern natural law Justices agree that the framers and ratifiers were motivated by such a sharing of powers view of government. At the same time, where the Constitution provides for an allocation of power, that text should be followed. Reflecting these principles, Justice Kennedy cautioned in *Public Citizen v. United States Dep’t of Justice*, “This is not to say that each of the three Branches must be entirely separate and distinct, for that is not the governmental structure of checks and balances established by the Framers. . . . But as to the particular divisions of power lines the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them.”6

Instrumentalists share this view. However, consistent with their interpretive method, they will place greater weight on arguments of purpose and structure, and less weight on text, than do natural law judges. Instrumentalist judges thus tend to focus on whether the purposes lying behind the structural separation of powers doctrine would be advanced or retarded, especially the need to preserve checks and balances and prevent the tyranny of any one branch. But they are sensitive to text when the text is clear. Thus, instrumentalist Justices Marshall and Stevens joined other members of the Court in *Bowsher v. Synar*,7 discussed at § 10.2.1(A) nn.20-21, to hold that Congress may not delegate power

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5 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 525 (1833).


to formulate national policy to one of its two Houses, to a legislative committee, or to an individual agent of Congress, such as the Comptroller General, in violation of the Bicameralism Clause’s text.

Holmesian judges share the view that separation of powers doctrine should be based on a sharing of powers approach, and a balance between text and purpose. Indeed, because of their strong policy of deference to government, Holmesian judges are the most likely to defer to arrangements agreed-upon by the other branches, unless those arrangements clearly violate the Constitution. For example, in INS v. Chadha, excerpted at § 9.3, Holmesian Justice White dissented from the Court’s striking down legislative vetoes of executive actions. In Bowsher v. Synar, discussed at § 10.2.1(A) n.22, Justice White dissented from the Court’s striking down provisions allowing the Comptroller General to determine what budget reductions were necessary to comply with the Gramm-Rudman budget bill. In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, discussed at § 10.3 nn.42-43, Justice White, joined by Chief Justice Rehnquist and instrumentalist Justice Marshall, dissented from the Court’s decision to hold invalid a Board of Review composed of members of Congress.8

At the other extreme from these views, the formalist preference for literal interpretation and bright-line rules suggests a strict separation of powers approach, without any balancing. Under such a view, there should be strict separation of powers based on the literal text of the Constitution, which provides in Article I, § 1, “all legislative Powers herein granted” are vested in Congress; in Article II, § 1, “the executive Power” is vested in the President; and in Article III, § 1, the “judicial power” is vested in “the Supreme Court and such inferior courts as Congress, from time to time, may establish.” Applied to issues of executive power, this view has been described as promoting a “Unitary Executive” model of government, with few checks and balances on executive action,9 although that view can be challenged on structural, historical, practice, and precedent grounds.10 Justice Scalia called for a strict separation of powers approach in a number of cases.11


9 See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541 (1994).


An additional separation of powers issue involves whether the judge is more sympathetic to exercises of legislative or executive power in cases where the two come into conflict. From the time of the Constitution until today, the Federalist/Whig/Republican party has always been more sympathetic to exercises of executive power, while the Jefferson/Jackson/Democratic party has always been more suspicious of executive power and more trusting of the legislative branch. Thus, judges appointed by Republican presidents tend to favor broad grants of executive power to the president. Judges appointed by Democratic presidents tend to restrain executive power in favor of legislative prerogatives. Some conservative Democratic judges, however, like Chief Justice Vinson and Justice Reed during the 1950s, have tended to share the Republican predisposition for executive power, as indicted by their dissent in *Youngstown Sheet*, excerpted at § 9.1.2 below.

The reasons for these predispositions are not altogether clear. It may be that more conservative individuals, typically Republican, are more comfortable with a “corporate” model of administration, with a strong CEO, and clearly-defined lines of authority, while more progressive individuals, with their faith in the “people,” prefer the most representative branch of government, the legislature. Certainly at the time of the founding, it was Jefferson and his associates who favored the legislative branch, and were more supportive of the strong notions of legislative supremacy consistent with the French Revolution, while conservatives, like Hamilton, favored stronger executive power closer to that of the English King, although without the King’s power to declare war.12

2. **Presidential Power over National Policy**

Under Article II, § 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.” Under Article II, § 1, cl. 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.” The Constitution also refers to other aspects regarding the election of Presidents, particularly right to vote for President and operation of the electoral college.

After vesting “executive Power” in the President in Article II, § 1, Article II continues by enumerating a number of specific presidential powers. Under Article II, § 2, cl. 1, the President is named “Commander in Chief,” and is given the power to “Pardon” individuals for federal crimes. For discussion of this pardon power, see *Charles D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW § 19.3.5 (2007)* (noting the power to pardon for federal crimes is textually unlimited, but acknowledging the widespread view that the President cannot pardon himself)

Under Art. II, § 1, cl. 7, the President shall receive a fixed compensation for his services, currently $400,000 a year, and shall not receive “any other Emolument” from the United States or from any individual State. Under Art. I, § 9, cl. 8, “no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept any present, Emolument, Office or Title, of any kind whatever, from any King, Prince, or foreign State.” For discussion of the Emoluments Clauses in the context of litigation against President Trump for payments to Trump International Hotel in Washington D.C., see District of Columbia v. Trump, 315 F. Supp. 875 (D. Maryland 2018) (comprehensive, well-reasoned opinion).

Under Art. II, § 2, cl. 2, the President is given the power, with the “Advice and Consent” of the Senate, to appoint “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.” The President is also given power to “make Treaties, provided two thirds of the Senators present concur,” and the power to “receive Ambassadors and other public Ministers” from foreign countries. Under Article II, § 3, the President has the duty to “take Care that the Laws shall be faithfully executed,” and the President “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.” Under Article I, § 7, cl. 2, after a bill is passed by both houses of Congress, it must be “presented to the President,” who may sign the bill or veto it, such veto capable of being overridden by a 2/3 majority in each House.

Unlike Article I, § 8, which lists Congress’s powers in some detail, Article II’s listing of powers, such as the “executive Power shall be vested in a President” or “Commander-in-Chief” power, are stated in broader terms. This has led to a number of cases where considerations other than literal text have predominated in the Court’s opinions. Perhaps the most famous of these cases is Youngstown Sheet & Tube Co. v. Sawyer, excerpted below, decided in 1952. In Youngstown Sheet, while Justice Black’s opinion did suggest the President’s powers are limited to the formal, textually enumerated powers, no other Justice agreed that the President's power was that limited. Based upon legislative and executive practice, and Court precedents, Holmesian Justice Jackson's analysis in the case suggested that Presidential power is dependent upon a functional analysis. Jackson noted:

(1) The President has maximum power when acting pursuant to an express or implied congressional authorization.

(2) A “zone of twilight” occurs if the President acts when Congress is silent. In this area, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Justice Clark added that the nature of the power probably depended on the gravity of the situation.

(3) The President has least power when acting contrary to the expressed or implied will of Congress. Courts can then sustain the President's action only by finding that Congress' will was expressed in an unconstitutional manner or it has no power over the subject.


14 Id. at 635-38 (Jackson, J., concurring); id. at 662 (Clark, J., concurring in the judgment).
Also focusing on arguments of legislative and executive practice, Holmesian Justice Frankfurter noted in his concurrence that even if Congress has been silent, “A systematic, unbroken, executive practice, long pursued by the knowledge of Congress, and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President.”\textsuperscript{15} Justice Frankfurter also discussed cases where Congress may not have approved the President’s action in advance, but subsequently ratified the President’s action, or may not have disapproved the President’s action in advance, but subsequently expressed their dissatisfaction.

The general separation of powers concern with promoting efficiency, while protecting against tyranny, also has shaped court decisions. Specifically, Congress has frequently allowed the President to take the lead in foreign affairs to promote efficiency in foreign policy decisionmaking. Thus, in considering executive versus legislative powers, the Court tends to give the President more leeway in cases involving foreign affairs, than those involving domestic power, where Congress’ policy-making power is more dominant. For domestic policy, the concern with prevention of presidential tyranny has been viewed as the greater concern than governmental efficiency.

Based on these considerations, Table 9 summarizes these “Justice Jackson” factors that the Court considers under the post-1937 non-formalist approach to presidential powers:

<table>
<thead>
<tr>
<th>Nature of the Problem</th>
<th>Nature of the Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Pure Foreign Affairs (e.g., Recognizing Foreign Governments)</td>
<td>1. Action Taken Pursuant to Express or Implied Congressional Approval</td>
</tr>
<tr>
<td>2. Primarily Foreign Affairs (e.g., Curtiss-Wright)</td>
<td>2. Subsequent Congressional Ratification</td>
</tr>
<tr>
<td>3. Mixed Foreign/Domestic (e.g., Dames &amp; Moore)</td>
<td>3. Action Taken Pursuant to Congressional Silence</td>
</tr>
<tr>
<td>4. Primarily Domestic (e.g., Youngstown Sheet)</td>
<td>4. Subsequent Congressional Disapproval of Action</td>
</tr>
<tr>
<td>5. Pure Domestic (e.g., Impounding Funds, as Under Impoundment Control Act)</td>
<td>5. Action Taken Pursuant to Implied or Express Congressional Disapproval</td>
</tr>
</tbody>
</table>

\textsuperscript{15} \textit{Id.} at 610-11 (Frankfurter, J., concurring).
Where the case involves a category nearer the top of the Table, the President’s authority to act will be greater than when the case involves facts near the bottom of the Table. In *Youngstown Sheet*, the President’s authority was near the bottom of this Table, as the case involved primarily a domestic issue, the seizure of steel mills, although it did have a foreign component, the proposed effect of a steel strike on the ability to provide military equipment for the Korean War. The case also involved action taken pursuant to implied congressional disapproval, as Congress had provided for alternative ways to resolve domestic strikes in times of emergency, such as the provision in the Labor Management Relations Act of 1947 (Taft-Hartley Act) for a 60-day cooling-off period with an injunction against a strike, followed by 20 days for a secret ballot upon the final offer of settlement, or referral of the controversy to the Wage Stabilization Board, which President Truman did, but whose recommendations were viewed as too favorable to the workers by steel management. Further, Congress had specifically rejected giving the President the power to seize plants unilaterally when considering the issue in the Taft-Hartley Act, as Justice Burton noted in his concurrence.18

In *Youngstown Sheet*, Justice Frankfurter’s “gloss on meaning” use of legislative and executive practice did not provide President Truman with much help. Justice Frankfurter noted that while President Roosevelt had taken unilateral action in the events leading up to World War II 12 times, 6 of those times were pursuant to congressional approval, 3 times involved subsequent ratification by Congress, and thus only 3 times even remotely resembled President Truman’s action in this case. Those facts did not demonstrate the kind of “consistent, unbroken, executive practice” necessary for triggering a strong “gloss on meaning” argument on these facts.19

The dissenters in *Youngstown Sheet*, Chief Justice Vinson and Justices Reed and Minton, also resorted to arguments of legislative and executive practice. They merely balanced them differently than did Justice Jackson. They concluded that the President was attempting to execute defense programs for the Korean War, and thus was acting pursuant to implied congressional authorization.20 Justice Vinson’s opinion also contained language focusing on the need for efficiency in government operations, suggesting that the President may have power where Congress is silent to deal with emergencies in ways that save legislative programs or which protect the country. As Chief Justice Vinson noted in his opinion, “A review of executive action demonstrates that on many occasions Presidents have exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to ‘take Care that the laws be faithfully executed.’”21

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19 343 U.S. at 612-13 (Frankfurter, J. concurring). Justice Frankfurter also provided an exhaustive Table summarizing executive seizures of private property in the past. Id. at 615 et. seq.

20 Id. at 670-72 (Vinson, C.J., joined by Reed & Minton, JJ., dissenting).

21 Id. at 683.
conservative judges, such as Chief Justice Vinson and Justices Reed and Minton, to resolve close cases in favor of presidential authority, and downplay concerns with presidential tyranny.

In contrast, liberal judges tend to resolve close questions more in favor of the legislative branch, and to be suspicious of broad grants of power to the President. As liberal instrumentalist Justice Douglas noted in his concurrence in Youngstown Sheet, focusing on the policy behind the President’s action in this case and in other potential future cases, “Today a kindly President uses the seizure power to effect a wage increase [based on the Wage Stabilization Board’s pro-union recommendations] and to keep steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.”

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Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579 (1952)

Justice BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. The issue emerges here from the following series of events:

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, United Steelworkers of America, C. I. O., gave notice of an intention to strike when the existing bargaining agreements expired on December 31. The Federal Mediation and Conciliation Service then intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1951, referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. This Board's report resulted in no settlement. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a. m. April 9. The indispensability of steel as a component of substantially

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all weapons and other war materials led the President to believe that the proposed work stoppage
would immediately jeopardize our national defense and that governmental seizure of the steel mills
was necessary in order to assure the continued availability of steel. Reciting these considerations for
his action, the President, a few hours before the strike was to begin, issued Executive Order 10340,
a copy of which is attached as an appendix. The order directed the Secretary of Commerce to take
possession of most of the steel mills and keep them running. The Secretary immediately issued his
own possessory orders, calling upon the presidents of the various seized companies to serve as
operating managers for the United States. They were directed to carry on their activities in
accordance with regulations and directions of the Secretary. The next morning the President sent a
message to Congress reporting his action. Cong. Rec., April 9, 1952, p. 3962. Twelve days later he

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the
District Court. Their complaints charged that the seizure was not authorized by an act of Congress
or by any constitutional provisions. The District Court was asked to declare the orders of the
President and the Secretary invalid and to issue preliminary and permanent injunctions restraining
their enforcement. Opposing the motion for preliminary injunction, the United States asserted that
a strike disrupting steel production for even a brief period would so endanger the well-being and
safety of the Nation that the President had "inherent power" to do what he had done – power
"supported by the Constitution, by historical precedent, and by court decisions." The Government
also contended that in any event no preliminary injunction should be issued because the companies
had made no showing that their available legal remedies were inadequate or that their injuries from
seizure would be irreparable. Holding against the Government on all points, the District Court on
April 30 issued a preliminary injunction restraining the Secretary from "continuing the seizure and
possession of the plants . . . and from acting under the purported authority of Executive Order No.
10340." 103 F. Supp. 569. On the same day the Court of Appeals stayed the District Court's
injunction. 197 F.2d 582. Deeming it best that the issues raised be promptly decided by this Court,
we granted certiorari on May 3 and set the cause for argument on May 12. 343 U.S. 937.

The President's power, if any, to issue the order must stem either from an act of Congress or from
the Constitution itself. There is no statute that expressly authorizes the President to take possession
of property as he did here. Nor is there any act of Congress to which our attention has been directed
from which such a power can fairly be implied. Indeed, we do not understand the Government to
rely on statutory authorization for this seizure. There are two statutes which do authorize the
President to take both personal and real property under certain conditions. However, the Government
admits that these conditions were not met and that the President's order was not rooted in either of
the statutes. The Government refers to the seizure provisions of one of these statutes (§ 201 (b) of
the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis
which was at hand."[Ed.: The other statute was The Selective Service Act of 1948, 50 U.S.C. § 468.]

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages
was not only unauthorized by any congressional enactment; prior to this controversy, Congress had
refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under
consideration in 1947, Congress rejected an amendment which would have authorized such
governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." After granting many powers to the Congress, Article I goes on to provide [in Art. I, § 8, cl. 18] that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into
execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

The judgment of the District Court is affirmed.

Justice DOUGLAS, concurring.

There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. The Congress, as well as the President, is trustee of the national welfare. The President can act more quickly than the Congress. The President with the armed services at his disposal can move with force as well as with speed. All executive power – from the reign of ancient kings to the rule of modern dictators – has the outward appearance of efficiency.

Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives. Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient. But as Mr. Justice Brandeis stated in his dissent in *Myers v. United States*, 272 U.S. 52, 293 [(1926)]: “The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

The great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other
in the land. It gives a position of leadership that is unique. The power to formulate policies and mold opinion inheres in the Presidency and conditions our national life. The impact of the man and the philosophy he represents may at times be thwarted by the Congress. Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement. Some future generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution.

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.

Justice FRANKFURTER, concurring.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words. The authoritatively expressed purpose of Congress to disallow such power to the President and to require him, when in his mind the occasion arose for such a seizure, to put the matter to Congress and ask for specific authority from it, could not be more decisive if it had been written into §§ 206-210 of the Labor Management Relations Act of 1947. Only the other day, we treated the Congressional gloss upon those sections as part of the Act. Bus Employees v. Wisconsin Board, 340 U.S. 383, 395-396. Grafting upon the words a purpose of Congress thus unequivocally expressed is the regular legislative mode for defining the scope of an Act of Congress. It would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President's power in terms into a statute rather than to have it authoritatively expounded, as it was, by controlling legislative history.

By the Labor Management Relations Act of 1947, Congress said to the President, "You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation." This of course calls for a report on the unsuccessful efforts to reach a voluntary settlement, as a basis for discharge by Congress of its responsibility – which it has unequivocally reserved – to fashion further remedies than it provided. But it is now claimed that the President has seizure power by virtue of the Defense Production Act of 1950 and its Amendments. And the claim is based on the occurrence of new events – Korea and the need for stabilization, etc. – although it was well known that seizure power was withheld by the Act of 1947, and although the President, whose specific
requests for other authority were in the main granted by Congress, never suggested that in view of the new events he needed the power of seizure which Congress in its judgment had decided to withhold from him. The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

No authority that has since been given to the President can by any fair process of statutory construction be deemed to withdraw the restriction or change the will of Congress as expressed by a body of enactments, culminating in the Labor Management Relations Act of 1947.

To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.

Such was the case of United States v. Midwest Oil Co., 236 U.S. 459 [(1915)]. The contrast between the circumstances of that case and this one helps to draw a clear line between authority not explicitly conferred yet authorized to be exercised by the President and the denial of such authority. In both instances it was the concern of Congress under express constitutional grant to make rules and regulations for the problems with which the President dealt. In the one case he was dealing with the protection of property belonging to the United States; in the other with the enforcement of the Commerce Clause and with raising and supporting armies and maintaining the Navy. In the Midwest Oil case lands which Congress had opened for entry were, over a period of 80 years and in 252 instances, and by Presidents learned and unlearned in the law, temporarily withdrawn from entry so as to enable Congress to deal with such withdrawals. No remotely comparable practice can be vouched for executive seizure of property at a time when this country was not at war, in the only constitutional way in which it can be at war. It would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War. See J. G. Randall, Constitutional Problems under Lincoln (Revised ed. 1951). Suffice it to say that he seized railroads in territory where armed hostilities had already interrupted the movement of troops to the beleaguered Capitol, and his order was ratified by the Congress.

The only other instances of seizures are those during the periods of the first and second World Wars. In his eleven seizures of industrial facilities, President Wilson acted, or at least purported to act,
under authority granted by Congress. Thus his seizures cannot be adduced as interpretations by a
President of his own powers in the absence of statute.

Down to the World War II period, then, the record is barren of instances comparable to the one
before us. Of twelve seizures by President Roosevelt prior to the enactment of the War Labor
Disputes Act in June, 1943, three were sanctioned by existing law, and six others were effected after
Congress, on December 8, 1941, had declared the existence of a state of war. In this case, reliance
on the powers that flow from declared war has been commendably disclaimed by the Solicitor
General. Thus the list of executive assertions of the power of seizure in circumstances comparable
to the present reduces to three in the six-month period from June to December of 1941. We need not
split hairs in comparing those actions to the one before us, though much might be said by way of
differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say
that these three isolated instances do not add up, either in number, scope, duration or
contemporaneous legal justification, to the kind of executive construction of the Constitution
revealed in the Midwest Oil case. Nor do they come to us sanctioned by long-continued
acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.

Justice JACKSON, concurring in the judgment and opinion of the Court.

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. While an interval of detached reflection may temper teachings of
that experience, they probably are a more realistic influence on my views than the conventional
materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we
approach the question of presidential power, we half overcome mental hazards by recognizing them.
The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing
the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent
executive office with its temporary occupant. The tendency is strong to emphasize transient results
upon policies – such as wages or stabilization – and lose sight of enduring consequences upon the
balanced power structure of our Republic.

A judge, like an executive adviser, 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. And court decisions are indecisive because of the
judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial
definitions of the power of any of its branches based on isolated clauses or even single Articles torn
from context. 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. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

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 possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

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. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

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. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category.

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. In cases where the purpose is to supply needs of the Government itself, two courses are provided: one, seizure of a plant which fails to comply with obligatory orders placed by the Government [Selective Service Act of 1948]; another, condemnation of facilities, including temporary use under the power of eminent domain [Defense Production Act of 1950]. The third is applicable where it is the general economy of the country that is to be protected rather than exclusive governmental interests [Labor Management Relations Act of 1947]. None of these were invoked. In choosing a different and
inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.

The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed . . ." That authority must be matched against words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty or property, without due process of law . . ." One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. [Ed.: As Solicitor General from 1938-1940, Justice Jackson had made such arguments in earlier cases] But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.
The Solicitor General, acknowledging that Congress has never authorized the seizure here, says practice of prior Presidents has authorized it. He seeks color of legality from claimed executive precedents, chief of which is President Roosevelt's seizure on June 9, 1941, of the California plant of the North American Aviation Company. Its 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.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." 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.

The essence of our free Government is "leave to live by no man's leave, underneath the law" – to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Justice BURTON, concurring in both the opinion and judgment of the Court.

Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war.

The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.
Justice CLARK, concurring in the judgment of the Court.

One of this Court's first pronouncements upon the powers of the President under the Constitution was made by Chief Justice John Marshall some one hundred and fifty years ago. In Little v. Barreme [2 U.S. (Cranch) 170 (1804)], he used this characteristically clear language in discussing the power of the President to instruct the seizure of the Flying Fish, a vessel bound from a French port: "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 seem 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." Accordingly, a unanimous Court held that the President's instructions had been issued without authority and that they could not "legalize an act which without those instructions would have been a plain trespass." I know of no subsequent holding of this Court to the contrary.

The limits of presidential power are obscure. However, Article II, no less than Article I, is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Some of our Presidents, such as Lincoln, "felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."

Others, such as Theodore Roosevelt, thought the President to be capable, as a "steward" of the people, of exerting all power save that which is specifically prohibited by the Constitution or the Congress. In my view – taught me not only by the decision of Chief Justice Marshall in Little v. Barreme, but also by a score of other pronouncements of distinguished members of this bench – the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself. As Lincoln aptly said, "[is] it possible to lose the nation and yet preserve the Constitution?" In describing this authority I care not whether one calls it "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise. I am of the conviction that those who have had the gratifying experience of being the President's lawyer have used one or more of these adjectives only with the utmost of sincerity and the highest of purpose.

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in Little v. Barreme, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.
Chief Justice VINSON, with whom Justice REED and Justice MINTON join, dissenting.

The President of the United States directed the Secretary of Commerce to take temporary possession of the Nation's steel mills during the existing emergency because "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." The District Court ordered the mills returned to their private owners on the ground that the President's action was beyond his powers under the Constitution.

This Court affirms. Some members of the Court are of the view that the President is without power to act in time of crisis in the absence of express statutory authorization. Other members of the Court affirm on the basis of their reading of certain statutes. Because we cannot agree that affirmance is proper on any ground, and because of the transcending importance of the questions presented not only in this critical litigation but also to the powers of the President and of future Presidents to act in time of crisis, we are compelled to register this dissent.

Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

The steel mills were seized for a public use. The power of eminent domain, invoked in this case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. Kohl v. United States, 91 U.S. 367 (1876). Plaintiffs cannot complain that any provision in the Constitution prohibits the exercise of the power of eminent domain in this case. The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." It is no bar to this seizure for, if the taking is not otherwise unlawful, plaintiffs are assured of receiving the required just compensation. United States v. Pewee Coal Co., 341 U.S. 114 (1951).

History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required.

Focusing now on the situation confronting the President on the night of April 8, 1952, we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be faithfully executed" – a duty described by President Benjamin Harrison as "the central idea of the office."

The President reported to Congress the morning after the seizure that he acted because a work stoppage in steel production would immediately imperil the safety of the Nation by preventing execution of the legislative programs for procurement of military equipment. And, while a shutdown could be averted by granting the price concessions requested by plaintiffs, granting such concessions would disrupt the price stabilization program also enacted by Congress. Rather than fail to execute either legislative program, the President acted to execute both.
Much of the argument in this case has been directed at straw men. We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. Here, the President immediately made sure that Congress was fully informed of the temporary action he had taken only to preserve the legislative programs from destruction until Congress could act.

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws – both the military procurement program and the anti-inflation program – has not until today been thought to prevent the President from executing the laws. Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a "mass of legislation" be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the "Take Care" clause, advocated by John Marshall, was adopted by this Court in In re Neagle, In re Debs and other cases cited supra. See also Ex parte Quirin, 317 U.S. 1, 26 (1942). Although more restrictive views of executive power, advocated in dissenting opinions of Justices Holmes, McReynolds and Brandeis, were emphatically rejected by this Court in Myers v. United States, supra, members of today's majority treat these dissenting views as authoritative.

There is no statute prohibiting seizure as a method of enforcing legislative programs. Congress has in no wise indicated that its legislation is not to be executed by the taking of private property (subject of course to the payment of just compensation) if its legislation cannot otherwise be executed. Indeed, the Universal Military Training and Service Act authorizes the seizure of any plant that fails to fill a Government contract or the properties of any steel producer that fails to allocate steel as directed for defense production. And the Defense Production Act authorizes the President to requisition equipment and condemn real property needed without delay in the defense effort. Where Congress authorizes seizure in instances not necessarily crucial to the defense program, it can hardly be said to have disclosed an intention to prohibit seizures where essential to the execution of that legislative program.

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act. The President's action served the same purposes as a judicial stay entered to maintain the status quo in order to preserve the jurisdiction of a court. In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.
As the District Judge stated, this is no time for "timorous" judicial action. But neither is this a time for timorous executive action. Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction – either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.

Following *Youngstown Sheet*, a strike commenced. Consumer inventories of steel ran low after 3 weeks, causing shutdowns in the auto industry. The government stockpiles ran low after 5 weeks. The strike ended after 7 weeks, substantially on union terms, in part because Truman threatened to place “obligatory orders” and then use the Selective Service Act provisions to seize the steel plants.

§ 9.2 Legislative Delegation of Power to the Executive Branch

When Congress delegates legislative power to the President, administrative agencies, or special commissions, a separation of powers concern arises if Congress has delegated too much policymaking power. To prevent this, the Court has required Congress to provide the delegated agent with congressionally developed standards to guide application of the delegated power.

During the formalist era, this doctrine was applied in a relatively strict manner, with the Court requiring detailed congressional standards or policies. For example, in *Schechter Poultry Corp. v. United States*, the Court considered that part of the Depression-era National Industrial Recovery Act which provided that the President was granted authority to approve or not various industry-adopted codes of fair labor practices, in this case the Code of Fair Competition for the Live Poultry Industry. The Act provided that as a condition of approval the President must find that the codes “impose no inequitable restrictions on admission to membership” and are not “designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.” The Court noted that these restrictions “leave virtually untouched the field of policy,” do not undertake “to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure,” and set up “no standards, aside from the statement of the general aims.” In short, “the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”

Similarly, in *Panama Refining Co. v. Ryan*, the Court struck down as an impermissible delegation of legislative power a part of the National Industrial Recovery Act which granted to the President the authority to prohibit the transportation in interstate and foreign commerce of petroleum products in excess of the amount permitted under any state law. The Court noted, “Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased.”

Reflecting a moderate version of formalism, which had the controlling votes on the Court during the formalist era, Chief Justice Hughes noted that, despite the unconstitutional delegation found in *Panama Refining*, the “Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.” Reflecting this moderate approach, in each case during the formalist era other than *Schechter Poultry* and *Panama Refining*, delegations of legislative power were upheld on the ground that adequate standards were provided. For example, in *J.W. Hampton, Jr., & Co. v. United States*, the President was granted authority to adjust tariffs on products imported from other countries to equalize differences in the cost of production. Citing numerous cases, the Court held, “What the President was required to do was merely in execution of an act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect.”

Since 1937, the Court has applied the doctrine regarding delegation of legislative power consistent with the non-formalist view that sharing of powers suggests that the Court should find that an “intelligible principle” was given by Congress to guide delegations, rather than to apply the doctrine in a relatively strict manner. For example, in *Mistretta v. United States*, the Court was faced with a challenge to the constitutionality of the United States Sentencing Commission, which was established to promulgate sentencing guidelines binding on the courts, subject to aggravating or mitigating factors. In discussing the doctrine regarding delegation, the 8 non-formalist Justices on the Court in 1989 stated:

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25 *Id.* at 421.
26 276 U.S. 394, 401-02, 406-11 (1928), and cases cited therein.
So long as Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”

Applying this “intelligible principle” test to congressional delegations, our jurisprudence has been driven by a practical understanding 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. Accordingly, this Court has deemed it “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”

In *Mistretta*, Congress charged the Commission with three goals: to assure meeting the purposes of sentencing set forth in the Act; to provide certainty and fairness in sentencing, while avoiding unwarranted sentencing disparities, but maintaining sufficient flexibility to permit individualized sentences; and to reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice system. Congress also specified four purposes of sentencing: to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public from further crimes; and to provide the defendant with needed correctional treatment. Congress also instructed the Commission that the sentencing ranges should be consistent with current provisions, not exceed current statutory maximums, and the current average sentence should be used as a starting point for structuring the sentencing guidelines. While such general aims might have raised a concern by the Court that decided *Schechter Poultry*, they raised no concern in *Mistretta*. Indeed, even formalist Justice Scalia in dissent acknowledged no problem with the “intelligibility” of the congressional standards in this case. As Justice Scalia stated, “What legislative standard, one must wonder, can possibly be too vague . . ., when we have repeatedly upheld, in various contexts, a ‘public interest’ standard.”

Under this approach, no federal statute since 1937 has been held invalid by the Court because of an excessive delegation of legislative power to an executive agency. Justice Scalia did dissent in *Mistretta*, however, based on the ground that the entire purpose of the Sentencing Commission was to exercise legislative power. Thus, unlike other cases, the delegated power was not being used as

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28 Id. at 372 (citations omitted).

29 Id. at 374-75.

30 Id. at 416 (Scalia, J., dissenting), citing National Broadcasting Co. v. United States, 319 U.S. 190, 216-17 (1943) (“public interest” regarding regulating radio and television licensing not too vague in the Communications Act of 1934, given the context of “the nature of radio transmissions and reception, by the scope, character, and quality of services” and by “the interest of the listening public in the ‘larger and more efficient use of radio’”); New York Central Securities Corp. v. United States, 287 U.S. 12, 24-25 (1932) (“public interest” not too vague in the Transportation Act of 1920, given context that it relates to “adequacy of transportation service, to its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities”).
ancillary to executive or judicial discharge of their normal governmental functions, but instead was an example of a pure delegation of legislative power, which Justice Scalia said was unconstitutional under his strict separation of powers approach. Scalia noted, “Strictly speaking, there is no acceptable delegation of legislative power,” referring to language from John Locke’s Second Treatise on Government in 1790, which stated that “the legislative can have no power to transfer their authority of making laws, and place it in other hands.”

Locke’s approach, which focused on only two branches of government, the legislative and the executive, with the judiciary as part of the executive branch, predated the development in the 18th century by Montesquieu and others of the tripartite system of government, and a sharing of powers approach to separation of powers issues. In addition, while a number of state constitutions at the time the Constitution was framed did have language consistent with a strict separation of powers approach, the first Congress specifically rejected the inclusion of such a strict separation of powers amendment in the original Bill of Rights. For these reasons, it is not surprising that all non-formalist Justices on the current Court have rejected this part of Justice Scalia’s analysis, grounding the constitutional doctrine regarding delegation solely on the “intelligibility” principle stated above. The Court confirmed this approach to the delegation doctrine in Whitman v. American Trucking Associations, Inc., excerpted below. Any related questions concerning appointment, removal, and powers given under any particular delegation, are handled as general separation of powers concerns.

Of course, before the Court will find that Congress has made an excessive delegation, the Court will search for a clear indication that Congress intended the delegation to be so broad. For example, in Solid Waste Agency v. Army Corps of Engineers, Chief Justice Rehnquist, writing for the Court, said, “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” The Chief Justice continued, “This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authorization.”

31 Id. at 419.


33 531 U.S. 457, 472-76 (2001). The Court also noted in Whitman that, in an unusual case of an unconstitutional delegation, an agency cannot can cure the unlawful delegation by adopting in its discretion a limiting construction of the statute. Id. at 473. See generally David M. Driesen, Loose Canons: Statutory Construction and the New Nondelegation Doctrine, 64 U. Pitt. L. Rev. 1 (2002).

In addition to these kinds of legislative delegations to other branches of the government, sometimes government delegates, or more properly speaking, “contracts out,” governmental functions to private parties. While some state courts have analyzed such delegations under state constitutional "vesting" clauses, vesting law-making power solely in the legislature not private parties, most state courts, and the federal courts, have typically analyzed such delegations under the Due Process Clause. As discussed at § 28.3.2(I), the issues presented in such cases usually involve either: (1) a concern with conflicts of interest where the private delegate may have a personal or pecuniary interest that is inconsistent with or repugnant to the public interest, or (2) the availability and extent of any agency or court review process of decisions made by the private actor. As discussed at § 28.3.2(J), related due process issues arise when a body of law has developed around the practice of legislatures or agencies incorporating or enacting a code or set of rules borrowed entirely from some outside group, such as local fire codes or licensing requirements for practicing medicine or law.

Whitman v. American Trucking Associations, Inc.
531 U.S. 457 (2001)

Justice SCALIA delivered the opinion of the Court.

These cases present the following questions: (1) Whether § 109(b)(1) of the Clean Air Act (CAA) delegates legislative power to the Administrator of the Environmental Protection Agency (EPA). (2) Whether the Administrator may consider the costs of implementation in setting national ambient air quality standards (NAAQS) under § 109(b)(1). (3) Whether the Court of Appeals had jurisdiction to review the EPA's interpretation of Part D of Title I of the CAA, 42 U.S.C. §§ 7501-7515, with respect to implementing the revised ozone NAAQS. (4) If so, whether the EPA's interpretation of that part was permissible.

Section 109(b)(1) of the CAA instructs the EPA to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health.” 42 U.S.C. § 7409(b)(1). The Court of Appeals held that this section as interpreted by the Administrator did not provide an “intelligible principle” to guide the EPA's exercise of authority in setting NAAQS. “[The] EPA,” it said, “lack[ed] any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much.” 175 F.3d, at 1034. The court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine. Id., at 1038. We disagree.


In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests “[a]ll legislative Powers herein granted ... in a Congress of the United States.” This text permits no delegation of those powers, Loving v. United States, 517 U.S. 748, 771 (1996); see id., at 776-777 (Scalia, J., concurring in part and concurring in judgment), and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.” J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. Both Fahey v. Mallonee, 332 U.S. 245, 252-253 (1947), and Lichter v. United States, 334 U.S. 742, 783 (1948), mention agency regulations in the course of their nondelegation discussions, but Lichter did so because a subsequent Congress had incorporated the regulations into a revised version of the statute, ibid., and Fahey because the customary practices in the area, implicitly incorporated into the statute, were reflected in the regulations, 332 U.S., at 250. The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would itself be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

We agree with the Solicitor General that the text of § 109(b)(1) of the CAA at a minimum requires that “[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air.” Tr. of Oral Arg. in No. 99-1257, p. 5. Requisite, in turn, “mean[s] sufficient, but not more than necessary.” Id., at 7. These limits on the EPA's discretion are strikingly similar to the ones we approved in Touby v. United States, 500 U.S. 160 (1991), which permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was “necessary to avoid an imminent hazard to the public safety.”” Id. at 163. They also resemble the Occupational Safety and Health Act of 1970 provision requiring the agency to “set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health” – which the Court upheld in Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 646 (1980), and which even then-Justice Rehnquist, who alone in that case thought the statute violated the nondelegation doctrine, see id., at 671 (opinion concurring in judgment), would have upheld if, like the statute here, it did not permit economic costs to be considered. See American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting).

The scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.” See Panama Refining Co.
v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 821, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not “unduly or unnecessarily complicate[d]” and do not “unfairly or inequitably distribute voting power among security holders.” American Power & Light Co. v. SEC, 329 U.S. 90, 104. We have approved the wartime conferral of agency power to fix the prices of commodities at a level that “will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.” Yakus v. United States, 321 U.S. 414, 420, 423-426 (1944). And we have found an “intelligible principle” in various statutes authorizing regulation in the “public interest.” See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 225-226 (1943) (Federal Communications Commission's power to regulate airwaves); New York Central Securities Corp. v. United States, 287 U.S. 12, 24-25 (1932) (Interstate Commerce Commission's power to approve railroad consolidations). In short, we have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting); see id., at 373 (majority opinion).

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. See Loving v. United States, 517 U.S., at 772-773; United States v. Mazurie, 419 U.S. 544, 556-557 (1975). While Congress need not provide any direction to the EPA regarding the manner in which it is to define “country elevators,” which are to be exempt from new-stationary-source regulations governing grain elevators, see 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a “determinate criterion” for saying “how much [of the regulated harm] is too much.” 175 F.3d, at 1034. In Touby, for example, we did not require the statute to decree how “imminent” was too imminent, or how “necessary” was necessary enough, or even – most relevant here – how “hazardous” was too hazardous. 500 U.S., at 165-167. Similarly, the statute at issue in Lichter authorized agencies to recoup “excess profits” paid under wartime Government contracts, yet we did not insist that Congress specify how much profit was too much. 334 U.S., at 783-786. It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are “nonthreshold” pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree. “[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” Mistretta v. United States, supra, at 417 (Scalia, J., dissenting) (emphasis deleted); see 488 U.S., at 378-379 (majority opinion). Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is “requisite,” that is, not lower or higher than is necessary – to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.
§ 9.3 Legislative Attempts to Control Delegated Power

With the rise of the administrative state during the New Deal in the 1930s, Congress began to pass a number of laws delegating power to administrative officials whose action could be set aside by a later veto by both Houses of Congress, one House of Congress, or, occasionally, a legislative committee. This was done by Congress to try to preserve some legislative control over the broad delegations which were being made. By the 1980s, roughly 300 such veto provisions had been passed in roughly 200 statutes. This practice was declared unconstitutional in *INS v. Chadha*.

**Immigration and Naturalization Service (INS) v. Chadha**  
462 U.S. 919 (1983)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in Nos. 80-2170 and 80-2171, and postponed consideration of the question of jurisdiction in No. 80-1832. Each presents a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act, 66 Stat. 216, as amended, 8 U.S.C. § 1254(c)(2), authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States.

After the House veto of the Attorney General's decision to allow Chadha to remain in the United States, the Immigration Judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The Immigration Judge held that he had no authority to rule on the constitutional validity of § 244(c)(2). On November 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals, again contending that § 244(c)(2) is unconstitutional. The Board held that it had "no power to declare unconstitutional an act of Congress" and Chadha's appeal was dismissed. App. 55-56.

Pursuant to § 106(a) of the Act, 8 U. S. C. § 1105a(a), Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha's position before the Court of Appeals and joined him in arguing that § 244(c)(2) is unconstitutional. In light of the importance of the question, the Court of Appeals invited both the Senate and the House of Representatives to file briefs *amici curiae*.

After full briefing and oral argument, the Court of Appeals held that the House was without constitutional authority to order Chadha's deportation; accordingly it directed the Attorney General "to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives." 634 F.2d 408, 436 (1980). The essence of its holding was that § 244(c)(2) violates the constitutional doctrine of separation of powers.
We granted certiorari in Nos. 80-2170 and 80-2171, and postponed consideration of our jurisdiction over the appeal in No. 80-1832, 454 U.S. 812 (1981), and we now affirm.

Congress . . . contends that the provision for the one-House veto in § 244(c)(2) cannot be severed from § 244. Congress argues that if the provision for the one-House veto is held unconstitutional, all of § 244 must fall. If § 244 in its entirety is violative of the Constitution, it follows that the Attorney General has no authority to suspend Chadha's deportation under § 244(a)(1) and Chadha would be deported. From this, Congress argues that Chadha lacks standing to challenge the constitutionality of the one-House veto provision because he could receive no relief even if his constitutional challenge proves successful.

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.” Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). Here, however, we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act, 8 U.S.C. § 1101 note, which provides: “If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.” (Emphasis added.)

This language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid. The one-House veto provision in § 244(c)(2) is clearly a “particular provision” of the Act as that language is used in the severability clause. Congress clearly intended “the remainder of the Act” to stand if “any particular provision” were held invalid. Congress could not have more plainly authorized the presumption that the provision for a one-House veto in § 244(c)(2) is severable from the remainder of § 244 and the Act of which it is a part. See Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938).

The presumption as to the severability of the one-House veto provision in § 244(c)(2) is supported by the legislative history of § 244. That section and its precursors supplanted the long established pattern of dealing with deportations like Chadha's on a case-by-case basis through private bills. Although it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406.

It is also contended that this is not a genuine controversy but "a friendly, non-adversary, proceeding," Ashwander v. TVA, 297 U.S., at 346 (Brandeis, J., concurring), upon which the Court should not pass. This argument rests on the fact that Chadha and the INS take the same position on the constitutionality of the one-House veto. But it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual.
A case or controversy is presented by these cases. First, from the time of Congress' formal intervention, see n.5, supra, the concrete adverseness is beyond doubt. Congress is both a proper party to defend the constitutionality of § 244(c)(2) and a proper petitioner under 28 U.S.C. § 1254(1). Second, prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha. We have already held that the INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's "aggrieved" status for purposes of appealing that decision under 28 U.S.C. § 1252, see supra, at 929-931. For similar reasons, the INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment. We agree with the Court of Appeals that "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him." 634 F.2d, at 419.

Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of these cases in the absence of any participant supporting the validity of § 244(c)(2). The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress. We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. See Cheng Fan Kwok v. INS, 392 U.S., at 210, n. 9; United States v. Lovett, 328 U.S. 303 (1946).

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained: "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." TVA v. Hill, 437 U.S. 153, 194-195 (1978).

By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:

"Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions visions were included in eighty-nine laws." Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L. Rev. 323, 324 (1977).
Justice White undertakes to make a case for the proposition that the one-House veto is a useful "political invention," and we need not challenge that assertion. We can even concede this utilitarian argument although the long-range political wisdom of this "invention" is arguable. It has been vigorously debated, and it is instructive to compare the views of the protagonists. See, e.g., Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N. Y. U. L. Rev. 455 (1977), and Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982). But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.

The purposes underlying the Presentment Clauses, Art. I, § 7, cls. 2, 3, and the bicameral requirement of Art. I, § 1, and § 7, cl. 2, guide our resolution of the important question presented in these cases. The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers, and we now turn to Art. I.

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." 2 Farrand 301-302. As a consequence, Art. I, § 7, cl. 3, supra, at 945-946, was added. 2 Farrand 304-305.

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. In The Federalist No. 73 (H. Lodge ed. 1888), Hamilton focused on the President's role in making laws: "If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence." Id., at 458. See also The Federalist No. 51. In his Commentaries on the Constitution, Joseph Story makes the same point. 1 J. Story, Commentaries on the Constitution of the United States 614-615 (3d ed. 1858).

The President's role in the lawmaker process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures.

The Court also has observed that the Presentment Clauses serve the important purpose of assuring that a "national" perspective is grafted on the legislative process: "The President is a representative
of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . ." Myers v. United States, supra, at 123.

The bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. See id., at 99-104. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. [Ed.: The Court noted each House has the power to determine its own internal procedures. Non-binding resolutions by one or both Houses, such as occasional "sense of the Senate resolutions" or Congress declaring the first Thursday of May "National Day of Prayer," would be other examples where the action does not involve "legislative power" because no legal rights are implicated]. Whether actions taken by either House are, in law and 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." S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization," the House took action that 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. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States.
Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure . . . . There are four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;

(c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

We hold that the congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is affirmed.

Justice POWELL, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the 1930's. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies. One reasonably may disagree with Congress' assessment of the veto's utility, but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases. In my view, the cases may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory
criteria. It thus undertook the type of decision that traditionally has been left to other branches. [Ed.: E.g., prohibition on bills of attainder, addressed at § 16.2.2] Even if the House did not make a de novo determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts. See 5 U. S. C. § 704 (providing generally for judicial review of final agency action); cf. Foti v. INS, 375 U.S. 217 (1963) (holding that courts of appeals have jurisdiction to review INS decisions denying suspension of deportation). Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," Buckley v. Valeo, 424 U.S., at 138, the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch, see id., at 138-141; cf. Springer v. Philippine Islands, 277 U.S., at 202.

Justice WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.

For all these reasons, the apparent sweep of the Court's decision today is regrettable. The Court's Art. I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decision in cases involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more readily indictable exemplar of the class is irresponsible. It was for cases such as these that Justice Brandeis wrote: "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress . . . . The Court will not 'formulate
a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N. Y. & P.S.S. Co. v. Emigration Commissioners, [113 U.S. 33, 39 (1885)]."* Ashwander *v. TVA, 297 U.S. 288, 345, 347 (1936) (concurring opinion).

Unfortunately, today's holding is not so limited.

If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Art. I requirements.

Nor are there strict limits on the agents that may receive such delegations of legislative authority so that it might be said that the Legislature can delegate authority to others but not to itself. While most authority to issue rules and regulations is given to the Executive Branch and the independent regulatory agencies, statutory delegations to private persons have also passed this Court's scrutiny. In *Currin v. Wallace*, 306 U.S. 1 (1939), the statute provided that restrictions upon the production or marketing of agricultural commodities was to become effective only upon the favorable vote by a prescribed majority of the affected farmers. *United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577 (1939)*, upheld an Act which gave producers of specified commodities the right to veto marketing orders issued by the Secretary of Agriculture. Assuming *Currin* and *Rock Royal Cooperative* remain sound law, the Court's decision today suggests that Congress may place a "veto" power over suspensions of deportation in private hands or in the hands of an independent agency, but is forbidden to reserve such authority for itself. Perhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court's view of the Art. I presentment and bicameralism commands.

The central concern of the presentation and bicameralism requirements of Article I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress – or, in the event of a presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2). The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo – the deportability of the alien – is consummated only with the approval of each of the three relevant actors.

I do not suggest that all legislative vetoes are necessarily consistent with separation-of-powers principles. A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question. But the legislative veto device here – and in many other settings – is far from an instance of legislative tyranny over the Executive. It is a necessary
check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress.

I regret that I am in disagreement with my colleagues on the fundamental questions that these cases present. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult to "[insure] 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," Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). I must dissent.

[Justice White then included an Appendix which “identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by committees of the Congress and provisions which require legislation (i.e., passage of a joint resolution) are not included.”]

Justice REHNQUIST, with whom Justice WHITE joins, dissenting.

By severing [the legislative veto in] § 244(c)(2), the Court permits suspension of deportation in a class of cases where Congress never stated that suspension was appropriate. I do not believe we should expand the statute in this way without some clear indication that Congress intended such an expansion.

The Court finds that the legislative history of § 244 shows that Congress intended § 244(c)(2) to be severable because Congress wanted to relieve itself of the burden of private bills. But the history elucidated by the Court shows that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own. Over the years, Congress consistently rejected requests from the Executive for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated that it would be willing to permit suspensions of deportation unless it could retain some sort of veto.

It is doubtless true that Congress has the power to provide for suspensions of deportation without a one-House veto. But the Court has failed to identify any evidence that Congress intended to exercise that power. On the contrary, Congress' continued insistence on retaining control of the suspension process indicates that it has never been disposed to give the Executive Branch a free hand. By severing § 244(c)(2) the Court has "confounded" Congress' "intention" to permit suspensions of deportation "with their power to carry that intention into effect." Davis, supra, at 484, quoting State ex rel. McNeal v. Dombaugh, 20 Ohio St. 167, 174 (1870).

Because I do not believe that § 244(c)(2) is severable, I would reverse the judgment of the Court of Appeals.
Focusing on the checks and balances concern of efficiency, Justice White noted that without the legislative veto, Congress must write more specific laws, abdicate its lawmaking function, or engage in oversight hearings and investigations, corrective legislation, or sunset laws – none of which are as satisfactory as the legislative veto. Justice Burger replied that administrative delegations are checked by legislative standards and judicial review, whereas there would be no such check here, thus raising a greater specter of legislative tyranny, the other checks and balances concern. Furthermore, where the text of the Constitution is so clear, it outweighs any checks and balances arguments of efficiency or arguments based on legislative and executive practice.  

Chief Justice Burger also noted in *Chadha* that other mechanisms, such as durational limits on authorizations and reporting requirements, could be used to ensure efficient government action. In addition, congressional oversight, including either threatening to, or actually, holding hearings on agency action, including subpoena power to compel testimony, or using Congress’ appropriation power to reduce an agency’s budget, are steps Congress can take to affect the agency’s use of delegated power. Without regard to the efficiency of these indirect means of oversight, it has been questioned whether in all circumstances such committee oversight will reflect accurately the view of Congress as a whole, particularly in cases where the executive branch chooses to withhold information from Congress that Congress thinks it needs to make an informed evaluation.  

In 1995, Congress passed the Congressional Review Act (CRA), which allows any member of the House or Senate to introduce a resolution of disapproval against a final agency rule. If passed and signed by the President, a CRA resolution knocks out the rule. In addition, the CRA requires all rules to be submitted to Congress before they take effect. This mechanism has not often been used. For example, in 1999, it was noted, “To date, only a few CRA resolutions of disapproval have been introduced and none have been passed by either House. There are many reasons for this, including Congress' institutional hesitance to adopt the CRA's new procedures and the fact that a resolution

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37 462 U.S. 919, 958 n.23 (1983) (Burger, C.J., opinion for the Court); id. at 968-73 (White J., dissenting).

38 Id. at 953 n.16, 957-59 (Burger, C.J., opinion for the Court).


of disapproval requires the same groundwork as ordinary legislation or appropriations riders.”42 In particular, as for any bill, such action requires the President’s approval, or else his veto overridden by a 2/3 vote in each house of Congress. To the extent that the agency action reflects the President’s views, the President may well veto any attempted change by Congress, although if the change is attached to a general appropriations bill the President wishes to sign, a veto may be more unlikely.

§ 9.4 Legislative Attempts to Enhance Executive Power

The Line-Item Veto Act of 1996 gave the President authority to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." The Act set forth a detailed expedited procedure for the consideration by Congress of a “disapproved bill.” These procedures basically involved re-passing the bill without giving the President a line-item veto power this time around.43 This “line-item” veto differs from the regular presidential veto, which is authorized by the Presentment Clause of Article 1, § 7, cl. 2, in that it occurs after the bill becomes law, and it cancels “in whole” only some of the provisions in the law. No constitutional text explicitly authorizes such presidential action that repeals or amends parts of duly enacted statutes.

In Clinton v. City of New York,44 excerpted below, a 6-3 Court declared the law unconstitutional on the ground that the procedures specified in the Act were not authorized by the Constitution. The Court noted that the Constitution has clear language in Article 1, § 7, cl. 2 giving the President the power to veto entire bills, not exercise a line-item veto power. Constitutional text simply does not authorize Congress and the President to create a different law than one whose text was voted on by both Houses and presented to the President for signature, even if such a line-item veto power would be efficient for the President to have, a power which 43 of 50 Governors have under state constitutions. As in Chadha, the text of the Constitution was sufficiently clear that it outweighed any contrary arguments based on general structural efficiency versus prevention of tyranny concerns, or on legislative and executive practice.

An interesting mix of three Justices concluded that the textual arguments were not sufficiently clear, and that general separation of powers doctrine supported the Line-Item Veto Act. Justice Scalia’s dissent, joined by Justice O’Connor and Justice Breyer, said that the Court had been misled by the title of the law since the action it authorizes is, in fact, not a line-item veto that would trigger concerns of consistency with the presentment clause of Article 1, §7, cl.2. Instead, Justice Scalia said, the statute was actually a form of executive impoundment of funds – a practice long approved


43 2 U.S.C.§ 691a, d.

by the Court, as in the Congressional Budget and Impoundment Control Act of 1974.\textsuperscript{45} In response, the Court majority noted that unlike an impoundment of certain funds for a specified period of time, this Act permitted the President to cancel an appropriation of funds, and thus was more like an impermissible line-item veto, than a mere limited impoundment of funds.\textsuperscript{46}

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**Clinton v. City of New York**


Justice STEVENS delivered the opinion of the Court.

The Line Item Veto Act (Act), 110 Stat. 1200, 2 U.S.C. § 691 et seq. (1994 ed., Supp. II), was enacted in April 1996 and became effective on January 1, 1997. The following day, six Members of Congress who had voted against the Act brought suit in the District Court for the District of Columbia challenging its constitutionality. On April 10, 1997, the District Court entered an order holding that the Act is unconstitutional. Byrd v. Raines, 956 F. Supp. 25. In obedience to the statutory direction to allow a direct, expedited appeal to this Court, see §§ 692(b)-(c), we promptly noted probable jurisdiction and expedited review. We determined, however, that the Members of Congress did not have standing to sue because they had not "alleged a sufficiently concrete injury to have established Article III standing," Raines v. Byrd, 521 U.S. 811, 830 (1997) (slip op., at 18); thus, "in . . . light of [the] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," id., at (slip op., at 8), we remanded the case to the District Court with instructions to dismiss the complaint for lack of jurisdiction.

Less than two months after our decision in that case, the President exercised his authority to cancel one provision in the Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251, 515, and two provisions in the Taxpayer Relief Act of 1997, Pub. L. 105-34, 111 Stat. 788, 895-896, 990-993. Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court again held the statute invalid, 985 F. Supp. 168, 177-182 (1998), and we again expedited our review. We now hold that these appellees have standing to challenge the constitutionality of the Act and, reaching the merits, we agree that the cancellation procedures set forth in the Act violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution.

[Ed.: The Court first held the parties had standing because each was denied a benefit – either a tax break or a government subsidy – by the President’s action.]

\textsuperscript{45} Id. at 464-69 (Scalia, J., joined by O’Connor, J., and joined in part by Breyer, J., concurring in part and dissenting in part), citing, inter alia, Train v. City of New York, 420 U.S. 35, 41 n.8 (1975) (discussing the Congressional Budget and Impoundment Control Act of 1974).

\textsuperscript{46} Id. at 442-47.
The Line Item Veto Act gives the President the power to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." 2 U.S.C. § 691(a) (1994 ed., Supp. II).

It is undisputed that the New York case involves an "item of new direct spending" and that the Snake River case involves a "limited tax benefit" as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. See 2 U.S.C. § 691(b) (1994 ed., Supp. II). He must determine, with respect to each cancellation, that it will "(I) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." § 691(a)(A). Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. See § 691(a)(B). It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. See § 691b(a). If, however, a "disapproval bill" pertaining to a special message is enacted into law, the cancellations set forth in that message become "null and void." Ibid. The Act sets forth a detailed expedited procedure for the consideration of a "disapproval bill," see § 691d, but no such bill was passed for either of the cancellations involved in these cases. A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, see § 691(c), but he does, of course, retain his constitutional authority to veto such a bill.

The effect of a cancellation is plainly stated in § 691e, which defines the principal terms used in the Act. With respect to both an item of new direct spending and a limited tax benefit, the cancellation prevents the item "from having legal force or effect." 2 U.S.C. §§ 691e(4)(B)-(C) (1994 ed., Supp. II). Thus, under the plain text of the statute, the two actions of the President that are challenged in these cases prevented one section of the Balanced Budget Act of 1997 and one section of the Taxpayer Relief Act of 1997 "from having legal force or effect." The remaining provisions of those statutes, with the exception of the second canceled item in the latter, continue to have the same force and effect as they had when signed into law.

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "Repeal of statutes, no less than enactment, must conform with Art. I." INS v. Chadha, 462 U.S. 919, 954 (1983). There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases. The President "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 . . . ." Art. II, § 3. Thus, he may initiate and influence legislative proposals.

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Moreover, after a bill has passed both Houses of Congress, but "before it becomes a Law," it must be presented to the President. If he approves it, "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." Art. I, § 7, cl. 2. His "return" of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Chadha, 462 U.S. at 951. Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. The Government has reviewed in some detail the series of statutes in which Congress has given the Executive broad discretion over the expenditure of appropriated funds. For example, the First Congress appropriated "sums not exceeding" specified amounts to be spent on various Government operations. See, e.g., Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. In those statutes, as in later years, the President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.

Although appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the "finely wrought" procedure commanded by the Constitution. Chadha, 462 U.S. at 951. We have been favored with extensive debate about the scope of Congress' power to delegate law-making authority, or its functional equivalent, to the President. The excellent briefs filed by the
parties and their amici curiae have provided us with valuable historical information that illuminates the delegation issue but does not really bear on the narrow issue that is dispositive of these cases. Thus, because we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act "impermissibly disrupts the balance of powers among the three branches of government." 985 F. Supp. at 179.

If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law," such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution. Cf. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995).

The judgment of the District Court is affirmed.

Justice KENNEDY, concurring.

A nation cannot plunder its own treasury without putting its Constitution and its survival in peril. The statute before us, then, is of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending. Nevertheless, for the reasons given by Justice Stevens in the opinion for the Court, the statute must be found invalid. Failure of political will does not justify unconstitutional remedies.

Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed., 1961). So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. The Federalist No. 84, pp. 513, 515; G. Wood, The Creation of the American Republic 1776-1787, pp. 536-543 (1969). It was at Madison's insistence that the First Congress enacted the Bill of Rights. R. Goldwin, From Parchment to Power 75-153 (1997). It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance. See Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1132 (1991).

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions. Quoting Montesquieu, the Federalist Papers made the point in the following manner:
"'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator: Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'" The Federalist No. 47, supra, at 303.

It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

The principal object of the statute, it is true, was not to enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President's powers beyond what the Framers would have endorsed.

It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. See Freytag v. Commissioner, 501 U.S. 868, 880 (1991); cf. Chadha, supra, at 942, n.13. Abdication of responsibility is not part of the constitutional design.

. . . By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

The Constitution is not bereft of controls over improvident spending. Federalism is one safeguard, for political accountability is easier to enforce within the States than nationwide. The other principal mechanism, of course, is control of the political branches by an informed and responsible electorate. Whether or not federalism and control by the electorate are adequate for the problem at hand, they are two of the structures the Framers designed for the problem the statute strives to confront. The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that these mechanisms, plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device. With these observations, I join the opinion of the Court.
Justice SCALIA, with whom Justice O'CONNOR joins, and with whom Justice BREYER joins as to Part III, concurring in part and dissenting in part.

III

I agree with the Court that the New York appellees have standing to challenge the President's cancellation of § 4722(c) of the Balanced Budget Act of 1997 as an "item of new direct spending." The tax liability they will incur under New York law is a concrete and particularized injury, fairly traceable to the President's action, and avoided if that action is undone. Unlike the Court, however, I do not believe that Executive cancellation of this item of direct spending violates the Presentment Clause.

The Presentment Clause requires, in relevant part, that "every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes 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," U.S. Const., Art. I, § 7, cl. 2. There is no question that enactment of the Balanced Budget Act complied with these requirements: the House and Senate passed the bill, and the President signed it into law. It was only after the requirements of the Presentment Clause had been satisfied that the President exercised his authority under the Line Item Veto Act to cancel the spending item. Thus, the Court's problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to "cancel" – prevent from "having legal force or effect" – certain parts of duly enacted statutes.

Article I, § 7 of the Constitution obviously prevents the President from cancelling a law that Congress has not authorized him to cancel. Such action cannot possibly be considered part of his execution of the law, and if it is legislative action, as the Court observes, "repeal of statutes, no less than enactment, must conform with Art. I." Ante, quoting from INS v. Chadha, 462 U.S. 919, 954 (1983). But that is not this case. It was certainly arguable, as an original matter, that Art. I, § 7 also prevents the President from cancelling a law which itself authorizes the President to cancel it. But as the Court acknowledges, that argument has long since been made and rejected. In 1809, Congress passed a law authorizing the President to cancel trade restrictions against Great Britain and France if either revoked edicts directed at the United States. Act of Mar. 1, 1809, § 11, 2 Stat. 528. Joseph Story regarded the conferral of that authority as entirely unremarkable in The Orono, 1 Gall. 137, 18 F. Cas. 830 (No. 10,585) (CCD Mass. 1812). The Tariff Act of 1890 authorized the President to "suspend, by proclamation to that effect" certain of its provisions if he determined that other countries were imposing "reciprocally unequal and unreasonable" duties. Act of Oct. 1, 1890, § 3, 26 Stat. 612. This Court upheld the constitutionality of that Act in Field v. Clark, 143 U.S. 649 (1892), reciting the history since 1798 of statutes conferring upon the President the power to, inter alia, "discontinue the prohibitions and restraints hereby enacted and declared," id., at 684, "suspend the operation of the aforesaid act," id., at 685, and "declare the provisions of this act to be inoperative," id., at 688.

As much as the Court goes on about Art. I, § 7, therefore, that provision does not demand the result the Court reaches. It no more categorically prohibits the Executive reduction of congressional
dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits the Executive augmentation of congressional dispositions in the course of implementing statutes that authorize such augmentation – generally known as substantive rulemaking. There are, to be sure, limits upon the former just as there are limits upon the latter – and I am prepared to acknowledge that the limits upon the former may be much more severe. Those limits are established, however, not by some categorical prohibition of Art. I, § 7, which our cases conclusively disprove, but by what has come to be known as the doctrine of unconstitutional delegation of legislative authority: When authorized Executive reduction or augmentation is allowed to go too far, it usurps the nondelegable function of Congress and violates the separation of powers.

I turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch.

Insofar as the degree of political, "law-making" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the Founding of the Nation.

The short of the matter is this: Had the Line Item Veto Act authorized the President to "decline to spend" any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead – authorizing the President to "cancel" an item of spending – is technically different. But the technical difference does not relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which is at issue here, is preeminently not a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President's action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

Justice BREYER, with whom Justice O'CONNOR and Justice SCALIA join as to Part III, dissenting.

II

I approach the constitutional question before us with three general considerations in mind. First, the Act represents a legislative effort to provide the President with the power to give effect to some, but not to all, of the expenditure and revenue-diminishing provisions contained in a single massive appropriations bill. And this objective is constitutionally proper.

When our Nation was founded, Congress could easily have provided the President with this kind of power.
At that time, a Congress, wishing to give a President the power to select among appropriations, could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto.

Today, however, our population is about 250 million, see U.S. Dept. of Commerce, Census Bureau, 1990 Census, the Federal Government employs more than four million people, see Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Analytical Perspectives 207 (1997) (hereinafter Analytical Perspectives), the annual federal budget is $ 1.5 trillion, see Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Budget 303 (1997) (hereinafter Budget), and a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. See, e.g., Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251. Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately. Thus, the question is whether the Constitution permits Congress to choose a particular novel means to achieve this same, constitutionally legitimate, end.

Second, the case in part requires us to focus upon the Constitution's generally phrased structural provisions, provisions that delegate all "legislative" power to Congress and vest all "executive" power in the President. See Part IV, infra. The Court, when applying these provisions, has interpreted them generously in terms of the institutional arrangements that they permit.

Third, we need not here referee a dispute among the other two branches.

III

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws.

Minor Premise: The Act authorizes the President to "repeal or amend" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law.

Conclusion: The Act is inconsistent with the Constitution.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President "canceled" the two appropriation measures now before us, he did not repeal any law nor did he amend any law. He simply followed the law, leaving the statutes, as they are literally written, intact.
[The Act] delegates to the President the power to decide how to spend the money to which the line item refers either for the specific purpose mentioned in the item, or for general deficit reduction.

[I]t is not, and it is not just like, the repeal or amendment of a law, or, for that matter, a true line item veto (despite the Act's title). Because one cannot say that the President's exercise of the power the Act grants is, literally speaking, a “repeal” or “amendment,” the fact that the Act's procedures differ from the Constitution's exclusive procedures for enacting (or repealing) legislation is beside the point. The Act itself was enacted in accordance with these procedures, and its failure to require the President to satisfy those procedures does not make the Act unconstitutional.

IV

Because I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles – principles that arise out of the Constitution's vesting of the "executive Power" in "a President," U.S. Const., Art. II, § 1, and "all legislative Powers" in "a Congress," Art. I, § 1. There are three relevant Separation of Powers questions here: (1) Has Congress given the President the wrong kind of power, i.e., "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?" These three limitations help assure "adequate control by the citizen's representatives in Congress," upon which Justice Kennedy properly insists. And with respect to this Act, the answer to all these questions is "no."

Viewed conceptually, the power the Act conveys is the right kind of power. It is "executive." As explained above, an exercise of that power "executes" the Act. Conceptually speaking, it closely resembles the kind of delegated authority – to spend or not to spend appropriations, to change or not to change tariff rates – that Congress has frequently granted the President, any differences being differences in degree, not kind.

If there is a Separation of Powers violation, then, it must rest, not upon purely conceptual grounds, but upon some important conflict between the Act and a significant Separation of Powers objective.

The Act does not undermine what this Court has often described as the principal function of the Separation of Powers, which is to maintain the tripartite structure of the Federal Government – and thereby protect individual liberty – by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

Nor can one say that the Act's basic substantive objective is constitutionally improper, for the earliest Congresses could have, . . . and often did, confer on the President this sort of discretionary authority over spending. . . . Nor can one say the Act's grant of power "aggrandizes" the Presidential office. The grant is limited to the context of the budget. It is limited to the power to spend, or not to spend, particular appropriated items, and the power to permit, or not to permit, specific limited exemptions from generally applicable tax law from taking effect.
The "nondelegation" doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. The Constitution permits Congress to "seek assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." J. W. Hampton, Jr., & Co. v. United States, 276 U.S. at 406. But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." United States v. Chicago, M., St. P. & P. R. Co., 282 U.S. 311, 324 (1931). Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J. W. Hampton, supra, at 409 (emphasis added).

The Act before us seeks to create such a principle in three ways. The first is procedural. The Act tells the President that, in "identifying dollar amounts [or] . . . items. . . for cancellation" (which I take to refer to his selection of the amounts or items he will "prevent from having legal force or effect"), he is to "consider," among other things, "the legislative history, construction, and purposes of the law which contains [those amounts or items, and] . . . any specific sources of information referenced in such law or . . . the best available information . . . ." 2 U.S.C. § 691(b) (1994 ed., Supp. II).

The second is purposive. The clear purpose behind the Act, confirmed by its legislative history, is to promote "greater fiscal accountability" and to "eliminate wasteful federal spending and . . . special tax breaks." H. R. Conf. Rep. No. 104-491, p. 15 (1996).

The third is substantive. The President must determine that, to "prevent" the item or amount "from having legal force or effect" will "reduce the Federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest." 2 U.S.C. § 691(a)(A) (1994 ed., Supp. II).

The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader.

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic Separation of Powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since they comply with Separation of Powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.
§ 10.1 The Appointment Power

There is clear text in the Constitution regarding the appointment of officers of the United States. Article II, § 2 of the Constitution provides, in pertinent part: “[The President] 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.” Under Article II, § 3, the President has the duty to “Commission all the Officers of the United States.”

An “Officer of the United States” is any appointee who exercises "significant authority” pursuant to the “laws of the United States.” For example, in Buckle v. Valeo, the Court held that Congress could not itself appoint members of the Federal Election Commission since those members were officers of the United States because they (1) hold a “continuing” office established by law and (2) wield “significant authority” because they would be making rules, giving advisory opinions, and determining the eligibility of funds for federal elective offices. On application of this doctrine, see Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) (“special trial judges” of the United States Tax Court are “Officers” and must be appointed consistent with the Appointments Clause); Lucia v. SEC, 138 S. Ct. 2044 (2018) (SEC’s Administrative Law Judges (ALJs) are “Officers” who exercise “significant authority” and thus must be appointed consistent with the Appointments Clause, not by merit-selection process administered by the Office of Personnel Management), citing, Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016). Under this approach, well over 90% of those who render service to the Federal Government are not “Officers.” See Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 506 n.9 (2010).

Instead of the current Buckley/Freytag case-by-case approach, Justices Thomas and Gorsuch have proposed a broad view that any individual “with responsibility for an ongoing statutory duty” should be viewed as an “Officer.” Lucia, 138 S. Ct. at 2056 (Thomas, J., joined by Gorsuch, J., concurring). In contrast, Justices Ginsburg and Sotomayor have proposed that one component of

1 424 U.S. 1, 124-37 (1976).
“significant authority” should be a requirement that the individual makes “final, binding decisions.” Thus any person who “merely advises and provides recommendations,” as do the ALJs in Lucia, should not be an “Officer.” Id. at 2065 (Ginsburg, J., joined by Sotomayor, J., dissenting).

As the text of the Appointments Clause indicates, the standard role of Congress in the appointment of federal executive officers or judges is the Senate power of Advice and Consent. While Congress may waive such Advice and Consent for “inferior Officers,” there is no requirement of such a waiver. For example, whether or not they could be viewed as “inferior Officers,” all lower federal court judges have always been subject to the Senate confirmation process. Under existing statutes, more than 1,200 executive positions are subject to Senate confirmation; when judges and military officers are added, the number reaches more than 3,000. By literal text, all Supreme Court Justices must be confirmed by the Senate, although the number of such Justices is determined by Congress, as provided at 28 U.S.C. § 1. Initially, there were 6 Supreme Court Justices. To deprive Jefferson of an appointment, the lame-duck Federalist Congress reduced this to 5 in 1801, but it was restored to 6 in 1802 by the Jeffersonian Congress. As the United States expanded and grew, Congress increased this number in 1807 to 7; in 1837 to 9; and in 1863 to 10. Following President Lincoln’s assassination in 1865, Congress reduced the number in 1866 to 7, wishing to deprive Lincoln’s Democratic Vice-President, Andrew Johnson, of the ability to nominate Supreme Court Justices. Once Johnson left office, Congress increased the number in 1869 back to 9, where it remains today.

In a series of appointments cases since 1986, a majority of the Court has used a non-formalist balancing approach to determine whether certain non-traditional methods of appointment were in violation of the Appointments Clause or the doctrine of the separation of powers. The first of these cases was Morrison v. Olson, which involved the Ethics in Government Act of 1978. That Act was a response to the “Saturday Night Massacre,” where in 1973 President Nixon terminated the power of Archibald Cox to investigate Watergate wrongdoing, a power the president had at the time. Political pressure forced Nixon to appoint Leon Jaworski to continue the investigation, which led to subsequent prosecutions, as referenced in United States v. Nixon, excerpted at § 10.4.1.

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Chief Justice REHNQUIST delivered the opinion of the Court.


provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

Briefly stated, Title VI of the Ethics in Government Act (Title VI or the Act), 8 U.S.C. §§ 591-599 (1982 ed., Supp. V), allows for the appointment of an “independent counsel” to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is “sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law,” to conduct a preliminary investigation of the matter. [Ed.: The main individuals covered by the Act included Cabinet level officers and the President and Vice-President of the United States.] When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act “for the purpose of appointing independent counsels.” 28 U.S.C. § 49 (1982 ed., Supp. V). If the Attorney General determines that “there are no reasonable grounds to believe that further investigation is warranted,” then he must notify the Special Division of this result. In such a case, “the division of the court shall have no power to appoint an independent counsel.” § 592(b)(1). If, however, the Attorney General has determined that there are “reasonable grounds to believe that further investigation or prosecution is warranted,” then he “shall apply to the division of the court for the appointment of an independent counsel.” The Attorney General's application to the court “shall contain sufficient information to assist the [court] in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction.” § 592(d). Upon receiving this application, the Special Division “shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.” § 593(b)

The parties do not dispute that “[t]he Constitution for purposes of appointment . . . divides all its officers into two classes.” United States v. Germaine, 99 U.S. (9 Otto) 508, 509 (1879). As we stated in Buckley v. Valeo, 424 U.S. 1, 132 (1976): “[P]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.” The initial question is, accordingly, whether appellant is an “inferior” or a “principal” officer. If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause.

The line between “inferior” and “principal” officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn. See, e.g., 2 J. Story, Commentaries on the Constitution § 1536, pp. 397-398 (3d ed. 1858) (“In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed inferior officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate”). We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the “inferior officer” side of that line. Several factors lead to this conclusion.

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be “subordinate” to the Attorney General (and the President) insofar as she possesses a degree
of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree “inferior” in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties. An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. Admittedly, the Act delegates to appellant “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,” § 594(a), but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department. § 594(f).

Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededlly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is “temporary” in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the “ideas of tenure, duration . . . and duties” of the independent counsel, Germaine, supra, 9 Otto, at 511, are sufficient to establish that appellant is an “inferior” officer in the constitutional sense.

This does not, however, end our inquiry under the Appointments Clause. Appellees argue that even if appellant is an “inferior” officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch. They contend that the Clause does not contemplate congressional authorization of “interbranch appointments,” in which an officer of one branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: “. . . 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.” On its face, the language of this “excepting clause” admits of no limitation on interbranch appointments. Indeed, the inclusion of “as they think proper” seems clearly to give Congress significant discretion to determine whether it is “proper” to vest the appointment of, for example, executive officials in the “courts of Law.” We recognized as much in one of our few decisions in this area, Ex parte Siebold, [100 U.S. 371 (1879)], where we stated: “It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. . . . But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.” Id., 100 U.S. (10 Otto), at 397-398.
We also note that the history of the Clause provides no support for appellees' position. Throughout most of the process of drafting the Constitution, the Convention concentrated on the problem of who should have the authority to appoint judges. At the suggestion of James Madison, the Convention adopted a proposal that the Senate should have this authority, 1 Records of the Federal Convention of 1787, pp. 232-233 (M. Farrand ed. 1966), and several attempts to transfer the appointment power to the President were rejected. See 2 id., at 42-44, 80-83. The August 6, 1787, draft of the Constitution reported by the Committee of Detail retained Senate appointment of Supreme Court Judges, provided also for Senate appointment of ambassadors, and vested in the President the authority to “appoint officers in all cases not otherwise provided for by this Constitution.” Id., at 183, 185. This scheme was maintained until September 4, when the Committee of Eleven reported its suggestions to the Convention. This Committee suggested that the Constitution be amended to state that the President “shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the [United States], whose appointments are not otherwise herein provided for.” Id., at 498-499. After the addition of “Consuls” to the list, the Committee's proposal was adopted, id., at 539, and was subsequently reported to the Convention by the Committee of Style. See id., at 599. It was at this point, on September 15, that Gouverneur Morris moved to add the Excepting Clause to Art. II, § 2. Id., at 627. The one comment made on this motion was by Madison, who felt that the Clause did not go far enough in that it did not allow Congress to vest appointment powers in “Superior Officers below Heads of Departments.” The first vote on Morris' motion ended in a tie. It was then put forward a second time, with the urging that “some such provision [was] too necessary, to be omitted.” This time the proposal was adopted. Id., at 627-628. As this discussion shows, there was little or no debate on the question whether the Clause empowers Congress to provide for interbranch appointments, and there is nothing to suggest that the Framers intended to prevent Congress from having that power.

We do not mean to say that Congress' power to provide for interbranch appointments of “inferior officers” is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, Siebold itself suggested that Congress' decision to vest the appointment power in the courts would be improper if there was some “incongruity” between the functions normally performed by the courts and the performance of their duty to appoint. 100 U.S. (10 Otto), at 398. In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court. We thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers. We have recognized that courts may appoint private attorneys to act as prosecutor for judicial contempt judgments. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). In Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), we approved court appointment of United States commissioners, who exercised certain limited prosecutorial powers. Id., at 353, n.2. In Siebold, as well, we indicated that judicial appointment of federal marshals, who are “executive officer[s],” would not be inappropriate. Lower courts have also upheld interim judicial appointments of United States Attorneys, see United States v. Solomon, 216 F.Supp. 835 (SDNY 1963), and Congress itself has vested the power to make these interim appointments in the district courts, see 28 U.S.C. § 546(d) (1982 ed., Supp. V).
Appellees next contend that the powers vested in the Special Division by the Act conflict with Article III of the Constitution. We have long recognized that by the express provision of Article III, the judicial power of the United States is limited to “Cases” and “Controversies.” See Muskrat v. United States, 219 U.S. 346, 356 (1911). As a general rule, we have broadly stated that “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.” Buckley, 424 U.S., at 123 (citing United States v. Ferreira, 13 How. 40 (1852); Hayburn's Case, 2 Dall. 409 (1792)). The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches. See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

[T]he Act vests in the Special Division the power to choose who will serve as independent counsel and the power to define his or her jurisdiction. § 593(b). Clearly, once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the “courts of Law,” there can be no Article III objection to the Special Division's exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III.

Nor do we believe, as appellees contend, that the Special Division's exercise of the various powers specifically granted to it under the Act poses any threat to the “impartial and independent federal adjudication of claims within the judicial power of the United States.” Commodity Futures Trading Comm'n v. Schor, supra, at 850. We reach this conclusion for two reasons. First, the Act as it currently stands gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Second, the Act prevents members of the Special Division from participating in “any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office.” 28 U.S.C. § 49(f) (1982 ed., Supp. V) (emphasis added); see also § 596(a)(3) (preventing members of the Special Division from participating in review of the Attorney General's decision to remove an independent counsel). We think both the special court and its judges are sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary such as would render the Act invalid under Article III.

Justice KENNEDY took no part in the consideration or decision of this case. [Ed.: Justice Kennedy was confirmed as a Justice too late to take part in all the deliberations in the case].

Justice SCALIA, dissenting.

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish – so that “a gradual concentration of the several powers in the same department,” Federalist No. 51, p. 321
(J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article I, § 1, provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Article III, § 1, provides that “[t]he 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.” And the provision at issue here, Art. II, § 1, cl. 1, provides that “[t]he executive Power shall be vested in a President of the United States of America.”

[T]his does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a “balancing test.” What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours – in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply announces, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not “so central to the functioning of the Executive Branch” as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decision-making the text of Article II that “the executive Power” must be vested in the President, the Court does not even attempt to craft a substitute criterion – a “justiciable standard,” see, e.g., Baker v. Carr, 369 U.S. 186, 210 (1962); Coleman v. Miller, 307 U.S. 433, 454-455 (1939), however remote from the Constitution – that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. Before this statute was passed, the President, in taking action disagreeable to the Congress,
or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged—insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned—in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U.S. Const., Art. I, § 6, cl. 1; Gravel v. United States, 408 U.S. 606 (1972). It is the very object of this legislation to eliminate that assurance of a sympathetic forum. Unless it can honestly be said that there are “no reasonable grounds to believe” that further investigation is warranted, further investigation must ensue; and the conduct of the investigation, and determination of whether to prosecute, will be given to a person neither selected by nor subject to the control of the President—who will in turn assemble a staff by finding out, presumably, who is willing to put aside whatever else they are doing, for an indeterminate period of time, in order to investigate and prosecute the President or a particular named individual in his administration. The prospect is frightening . . . even outside the context of a bitter, interbranch political dispute. Perhaps the boldness of the President himself will not be affected—though I am not even sure of that. (How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds—or, for that matter, how easy it is for one of the President's political foes outside of Congress—simply to trigger a debilitating criminal investigation of the Chief Executive under this law.) But as for the President's high-level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that the Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff.

The Court also held in Morrison that the Act did not violate separation of powers principles by imposing significant executive or administrative duties of a non-judicial nature on Article III judges. Under Court precedents, Congress cannot impose significant extra duties on judges. The selection by the Chief Justice of 3 judges to serve on the Special Division in Morrison, who would then select the independent counsel, did not fall into this category. Many statutes provide for the Chief Justice to make selection among sitting federal judges to serve on special judicial bodies, such as the Foreign Intelligence Surveillance Court, which deals with government applications for electronic surveillance; the Alien Terrorist Removal Court, which hears alien removal proceedings; and the Judicial Panel on Multidistrict Litigation, which hears certain mass tort cases.4

In 1998, Congress declined to extend the provisions of the Ethics in Government Act. The Act was initially authorized in 1978 to run for 15 years, but was extended for 5 years in 1993 by a Democrat-controlled Congress. By 1998, support among both Democrats and Republicans had waned, in part because Republicans believed the Act gave Lawrence Walsh too much independent power in his Iran-Contra Investigation of the Reagan Administration during the 1980s, and Democrats believed the Act gave Kenneth Starr too much independent power in his investigation of President Clinton during the 1990s. With the Act no longer in force, investigations today of Cabinet-level officials, or the President or Vice-President, would likely be done by independent counsels appointed by the Attorney General, or appropriate designate, if the Attorney General’s actions were under review.

Soon after *Morrison*, the Court decided another case where the majority used a non-formalist approach to an appointments issue. In *Mistretta v. United States*, the Court upheld the United States Sentencing Commission on general separation of power grounds, in addition to upholding the Commission as a proper delegation of legislative authority, discussed at § 9.2 nn.27-30. The Sentencing Commission is composed of 7 members appointed by the President with the Advice and Consent of the Senate. At least 3 of the 7 members must be federal judges. Because Advice and Consent of the Senate was required, the literal text of the Appointments Clause was met.

Regarding general separation of powers concerns with efficiency versus the prevention of tyranny, the Court said, consistent with a non-formalist approach, that statutes could to some degree commingle the functions of the branches where that did not pose a danger of aggrandizement of the powers of one branch or encroachment on the functions of another. The Court noted in *Mistretta* that efficiency was advanced because judicial participation would ensure that sentencing guidelines would be informed by judicial experience, and the limited service on the Commission would not undermine judicial effectiveness by exhausting the resources of the judicial branch, or undermine public perception of the impartiality of the judiciary, since rationalizing sentencing is an “essentially neutral endeavor.” With regard to tyranny, there was no impermissible aggrandizement of judicial power, since judges had determined criminal sentences in cases prior to the law.

Since *Mistretta* was decided, a district court held that the “Feeney Amendment,” which altered the membership of the Sentencing Commission to provide that “not more than three federal judges” may sit on the 7-person Commission, but did not ensure that three federal judges sit on the Commission, aggrandized executive power too much and constituted executive encroachment on the judicial sentencing authority. Whether that balancing of executive versus judicial authority would be upheld on appeal is unknown. The opinion makes clear that courts consider not only specific textual language, like the Appointments Clause, but also general separation of powers concerns like (1) the “efficiency” and “no incongruity” principles of *Morrison/Mistretta* and (2) the prevention of tyranny and no impermissible aggrandizement or delegation of power aspects of *Morrison/Mistretta*.

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A third Supreme Court case regarding appointment is *Public Citizen v. United States Department of Justice*.

In *Public Citizen*, the issue was whether the Federal Advisory Committee Act, which requires groups who advise the President on public affairs to hold open meetings and make their records public, called for the Justice Department to make public their reports on nominees for federal judicial nominees. The Court interpreted the statute not to apply to judicial nominations, thus avoiding constitutional difficulties. Justices Kennedy, Rehnquist and O'Connor thought the Act did apply, but was unconstitutional. Justice Kennedy noted that where there no was violation of express constitutional text, a “balancing test” was appropriate in cases like *Morrison* and *Mistretta*. Here, however, the explicit text of the Appointment Clause grants to the President the power to nominate federal judges. The only textual limitation on that power is the Incompatibility Clause, which prevents Senators or Representatives from being 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” in office. Since the Act placed additional limits on the nomination process, the Act was unconstitutional as violating clear constitutional text. By the same reasoning, congressional limitations on appointment, like Congress’ view that the head of the Women’s Bureau at the Department of Labor should be a woman, are unconstitutional limitations on whom the President can nominate to fill a position. Of course, if the President were to nominate a man for that position, the Senate could refuse to confirm under the Advice and Consent power.

Article II, § 2, cl. 3 provides, “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 as the End of their next Session.” It could be argued that this literal text only gives the President this “Recess” power if the vacancy is created during a period that the Senate is in Recess. Alexander Hamilton’s discussion of the clause in *The Federalist Papers* No. 67 supports this view. Hamilton wrote:

> The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, singly, to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session." 

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10 The Federalist No. 67 (A. Hamilton).
By executive practice, Presidents have always interpreted this provision as a power to fill any vacant position that otherwise would require Senate confirmation by an appointment when the Senate is in recess, and congressional acquiescence has fixed this as the accepted view.\footnote{11} It has been noted:

Indeed, the matter lacks major controversy . . . . Why does the clause so clearly mean something it does not say? It can only be because the "arise" interpretation does not make sense in light of the clause's purpose. If the president needs to make an appointment, and the Senate is not around, when the vacancy arose hardly matters; the point is that it must be filled now. This represents [an] instance of purpose trumping, or at least informing our reading of, the text.

\ldots Attorney General Henry Stanbury once argued if "happen" meant "occurring during the recess," then the president could possess authority to make a recess appointment when the Senate is in session. This would happen if a position opened during the Senate's recess, triggering the recess appointment authority, but was still not filled when Senate returned; an appointment made then would still fill a vacancy that "happen[ed] during the recess of the Senate." Therefore, "happen during the recess" must mean "exist" rather than "occur."\footnote{12}

Despite these considerations, two recent Court of Appeals challenged the accepted view of the Recess Power, and the Supreme Court considered the issue in \textit{NLRB v. Noel Canning}.\footnote{13} Four Justices adopted the Court of Appeals' "literal" interpretation that the President can only use the recess power for positions which become available during a Senate recess and recess appointments must be made during that recess period. The majority, however, followed executive and legislative practice allowing the President to make "recess" appointments for any vacancy as long as the Senate is in "recess" when the appointment occurs, but noted that virtually all such appointments have come when the "recess" was longer than 10 days. In this case, the President made the "recess" appointment when Congress was meeting in \textit{pro forma} sessions every three days, because under Art. I, § 5, cl. 4, "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," and the House of Representatives did not agree to a longer recess, in part to prevent the President from making "recess" appointments. The Court concluded that this short three-day period was not a "recess" triggering the Clause, except perhaps for "emergency" circumstances where a "recess" appointment even during that short period might be permitted.

Bowing to the political dynamic involved, even under the broader view of the recess power, Presidents have not used this recess power often. It has been used, however, for both non-Cabinet


\footnote{13} 134 S. Ct. 2550 (2014); \textit{id.} at 2592 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., concurring in the judgment), \textit{citing NLRB v. New Vista Nursing & Rehabilitation}, 719 F.3d 203 (3rd Cir. 2013); Noel Canning Division of Noel Corp. v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).
level executive appointments, such as President Bush appointing John Bolton to be United Nations Ambassador in 2005, and appointment of lower federal court judges. Presidents rarely use the recess power for controversial Supreme Court or Cabinet appointments: President Washington used the recess power to appoint Chief Justice Rutledge in 1795 (his formal nomination later rejected by the Senate, 10-14); President Eisenhower used the recess power to appoint Lewis Strauss as Secretary of Commerce in 1958 (his formal nomination later rejected by the Senate, 46-49). Less controversial recess appointments have been made more frequently, such as President Eisenhower’s appointments of Chief Justice Warren (1953), Justice Brennan (1956), and Justice Stewart (1958) to fill vacancies in October at the start of the Court’s term (those nominees all easily confirmed the following year), or President George H.W. Bush elevating Lawrence Eagleburger from Deputy Secretary of State to Secretary of State in 1992. By historical practice, no individual has ever been appointed to the same recess position twice, and under 5 U.S.C. § 5503(a) they would not be paid if they were. Under the clause’s text, the recess appointment “shall expire at the end of the their [the Senate’s] next Session,” which under current practice would mean the end of the next calendar year.

An additional method of appointment for executive officials to fill positions without formal Senate Advice and Consent is represented by the Vacancies Act. The Vacancies Act, first passed in 1868, delegates to the President limited authority to temporarily fill certain vacancies in executive agencies or military departments. As provided at 5 U.S.C. § 3345, when a vacancy occurs by death, resignation, or other inability to perform duties, including illness, in a position whose appointment is not vested in the head of the department, but rather subject to Senate Advice and Consent, the “first assistant” to the office is designated to perform the functions of that office, unless the President directs another person who serves in a position subject to Senate Advice and Consent, or a person within the agency itself, whether subject to Senate Advice and Consent, to perform the functions and duties of the vacant office. This power is subject to certain specified limitations regarding length of service and rank of pay, and the time limitations of 5 U.S.C. § 3346, which in general provide for service of a maximum of 210 days. For many Cabinet-level Departments, executive orders have

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14 See generally Michael Herz, Abandoning Recess Appointments?: A Comment on Hartnett (And Others), 26 Cardozo L. Rev. 443, 448-58 (2005). Presidents of both parties have used the power occasionally to appoint judges blocked by the Senate. President Clinton used the power to appoint Roger Gregory to the 4th Circuit in December 2000. President Bush used the power to appoint Charles Pickering, Sr. to the 5th Circuit in January 2004, and William Pryor, Jr. to the 11th Circuit in February 2004. President Obama never used the recess power to appoint judges.

15 On the Vacancies Act, see Brannon P. Denning, Article II, the Vacancies Act and the Appointment of “Acting” Executive Branch Officials, 76 Wash. U.L.Q. 1039 (1998). In NLRB v. SW General, Inc., 137 S. Ct. 929 (2017), the Court held that the limitations in the Federal Vacancies Reform Act that a person cannot serve as an “acting” agency officer if the President has nominated that person to fill the position and is awaiting Senate confirmation applies not only to “first assistants” who automatically assumed the position when their boss left, but also applies to anyone designated as an acting agency officer. Id. at 949 (Sotomayor, J., joined by Ginsburg, J., dissenting).
been promulgated indicating a line of succession to be followed in the absence of contrary Presidential appointment.16

§ 10.2 The Executive Removal Power and Congress’ Power of Impeachment

1. The Executive Removal Power

A. No Direct Congressional Role in Removal

The Constitution contains no explicit text regarding the removal of executive officers, except for the provisions regarding impeachment, addressed at § 10.2.2. In the absence of explicit text, the Court has applied general separation of powers principles. As an historical matter, President Andrew Johnson’s removal of the Secretary of War (since 1947, named the Secretary of Defense) without Senate approval caused the House to impeach President Johnson in 1868, though the Senate by one vote did not convict. Later Court doctrine has upheld the President’s power to fire a member of his Cabinet “at will” without congressional interference in the decision, as discussed at § 10.2.1(B) n.25.

The accepted separation-of-powers view is that Congress can never exercise removal power over a member of the executive branch. This is consistent with the conclusion of the First Congress, and clear Supreme Court doctrine. Under Article III, there is no real debate regarding removal of federal judges, since Article III judges have life-tenure “during good Behaviour” and have never been removed except by impeachment. Regarding separation-of-power principles, it has been noted:

[A] Senate removal role would transform the executive into a "two-headed monster." Officers could entrench themselves by serving the Senate's interests rather than satisfying the executive, "which is constitutionally authorized to inspect and control" their conduct. . . . Likewise, if the executive enjoyed the power to remove subject to the whim of Congress, that doctrine would set "the Legislature at the head of the Executive branch." Rather than the president directing his branch, Congress could parcel out the executive power to executive officers by providing that the president could not remove certain officers. Then the officers "who are to aid him in the duties of that department" would not be responsible to him. Either construction would give credence to complaints that the Constitution had failed to adequately separate powers and violate the Constitution's implicit bar against uniting any two of the three fundamental powers of government.19

16 See 5 U.S.C.A. § 3345, Historical and Statutory Notes, Executive Orders.


19 Prakesh, supra note 17, at 795-96.
Applying these general principles, the Court held in 1986 in *Bowsher v. Synar*\(^\text{20}\) that Congress could not authorize the Comptroller General, an official of the legislative branch and director of the Congressional Budget Office, to determine what budget reductions were necessary to comply with the Gramm-Rudman-Hollings Act budget guidelines. The Court noted that making the Comptroller General an executive officer for purposes of this Act created a problem since Congress had retained power to remove the Comptroller under several standards, such as "inefficiency" or "neglect of duty." The Court said that Congress can remove executive officials only by impeachment. Otherwise Congress would be executing the laws in violation of the principle of separation of powers, and could impede too greatly upon the President’s ability to manage effectively the executive branch.

Justice Stevens, joined by Justice Marshall, concurred in the result on the ground that Congress may not delegate power to formulate national policy to one of its two Houses, to a legislative committee, or to an individual agent of Congress, such as the Comptroller General. Unlike the majority, which viewed the Comptroller General’s role under the Gramm-Rudman-Hollings Act as executive, they viewed his role as making the legislative policy decision regarding the need for budget reductions. Under *Chadha*, excerpted at § 9.3, legislative actions must comply with bicameralism and presentment. While in this case this alternative characterization led to the same result, probably the better argument is that in executing the provisions of the Act, the Comptroller General was exercising executive powers, as held by the majority.

On the question of removal, assuming the Comptroller General was exercising executive functions, Justices Stevens and Marshall agreed with Justices White and Blackmun in dissent that from a functional perspective there was no real danger that the Comptroller General would be rendered subservient to Congress. Thus, for them, the literal fact of a removal power was not sufficient to make the Act unconstitutional on this ground.\(^\text{21}\)

Justice White, a Holmesian, dissented from the Court’s result. He agreed with the Court that the functions performed by the Comptroller General were “executive” in nature, but he complained that the Court did not adopt a sufficiently functional view of the removal issue. Justice White acknowledged that Congress retained, as an analytic matter, removal power over the Comptroller General, and that constitutional text and basic separation of powers principles suggest that Congress’ only power of removal over executive officials is by impeachment. Nonetheless, Justice White stated that Congress’ power to remove the Comptroller had only minimal practical significance and posed no threat to the basic scheme of separation of powers. Thus, from a functional perspective, Congress’ removal power should pose no constitutional problem.\(^\text{22}\) Similarly adopting a functional


\(^{21}\) *Id.* at 739-41, 748-53 (Stevens, J., joined by Marshall, J., concurring in the judgment).

\(^{22}\) *Id.* at 769-76 (White, J., dissenting).
approach, instrumentalist Justice Blackmun, dissenting, said he would cure any constitutional problem by refusing to allow congressional removal of the Comptroller if it were ever attempted.23

In response to Bowsher, Congress repassed the Budget Act, but made the Director of the Office of Management and Budget the person responsible for implementing the Act. Since the Director of the OMB is a member of the executive branch, who serves at the pleasure of the President, there was no constitutional problem with this new statute with regard to the categorical rule stated in Bowsher that Congress can exercise no removal power over a member of the executive branch.

### B. Congress Limiting Grounds on Which the President or Head of a Department Can Remove Executive Officials

In Morrison v. Olsen,24 the Court was faced not with Congress attempting to exercise removal power, but with Congress limiting the President’s ability or the Head of a Department’s ability to remove an executive official. The limited interference with the power of removal in Morrison provided that the Attorney General could remove the Independent Counsel only for “good cause.” The Court said that this limited removal power is consistent with prior precedent, which allowed Congress to provide limited periods of office for independent agencies, and forbid removal in the meantime, except for “good cause” or other similar terminology like “neglect of duties or malfeasance in office.” The real issue is whether the removal restrictions are of such a nature that they “impede” the President's ability to perform his constitutional duties. Here, as with many independent agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the Food and Drug Administration, the Federal Election Commission, and others, the President's need to control the exercise of counsel's discretion was viewed as not so central to the functioning of the executive branch as to require that counsel be terminated at will by the President. Nor was the President's power to supervise impermissibly burdened because the Attorney General's power to terminate with “good cause” gives the President ample authority to assure that counsel is competently performing statutory duties.

In contrast, in cases involving individuals with more high-level, policy-making executive functions, like Cabinet officers and their high-level subordinates, the Court has stated that Congress cannot limit the President’s ability to remove if that would impermissibly “impede” the President’s ability efficiently to run his administration. As the Court noted in Morrison, “[T]here are some ‘purely executive’ officials who must be removable by the President at will if he is to accomplish his constitutional role.”25 This is particularly true for those policymaking positions typically viewed as part of the President’s team.

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23 Id. at 776-87 (Blackmun, J., dissenting).


25 Id. at 689-91.
This post-1937 doctrine represents an evolution from pre-1937 doctrine. Consistent with the general observation, discussed at § 1.1.4 n.15, that pre-1937 doctrine adopted more categorical tests, while post-1937 doctrine has been more functional in adopting balancing tests, the removal doctrine before 1937 adopted more rigid categorical distinctions. For example, in 1926, the Court declared in *Myers v. United States*,\(^{26}\) that “the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.” In 1935, in *Humphrey’s Executor v. United States*,\(^{27}\) the Court noted that for “quasi-legislative” or “quasi-judicial” officials, such as those working at administrative agencies with a mixture of rule-making, enforcement, or administrative law judge responsibilities, the authority of Congress “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.”

Consistent with post-1937 doctrine not being as predisposed to adopt categorical tests like “executive” versus “quasi-legislative” or “quasi-judicial,” the Court said in 1988 in *Morrison*:

We undoubtedly did rely on the terms ”quasi-legislative” and ”quasi-judicial” to distinguish the officials involved in *Humphrey’s Executor* . . . from those in *Myers*, but 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.

[T]he 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.\(^{28}\)

Under *Morrison*, it would be an interesting question if Congress placed limits on the President’s ability to remove the Director of the FBI or CIA, whether that position would be viewed as part of the President’s team, or for other reasons constitutionally removable at will, or would be treated like a Director, or one of a number of Commissioners, of an Independent Agency, and thus able to be protected from at-will removal by statute. While there is no current statutory protection for the Director of the FBI or CIA, in practice such Directors are not replaced at the start of a new presidency, as are Cabinet positions, but tend to survive from one administration to the next.

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\(^{26}\) 272 U.S. 52, 106 (1926).


\(^{28}\) *Morrison*, 487 U.S. at 689-90.
Applying a formalist, strict separation of powers approach, Justice Scalia said in dissent in *Morrison* that restrictions on removal for “good cause” should always be viewed as resulting in impeding of executive power as applied to principal officers subject to Senate Advice and Consent, without the need for any balancing test regarding the extent of the intrusion on presidential prerogatives. However, in Justice Scalia’s view, restrictions on removal for good cause should always be permissible for inferior officers appointed without Advice and Consent, but subject to supervision by the President or Head of Department who appointed them, as long as the “good cause” limitation would permit the President or Head of Department to remove the individual for failure to accept supervision. Structured as a bright-line rule, Justice Scalia noted that this doctrine was consistent with the formalist-era cases of *Myers* and *United States v. Perkins*. It would also preserve great discretion in the executive branch, consistent with a conservative predisposition toward executive power, addressed at § 9.1.1 n.14. That conservative predisposition appears in the following case.

**Free Enterprise Fund v. Public Company Accounting Oversight Board**

*130 S. Ct. 3138 (2010)*

Chief Justice ROBERTS delivered the opinion of the Court.

Our Constitution divided the “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). Article II vests “[t]he executive Power . . . in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” Art. II, § 1, cl. 1; id., § 3. In light of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334 (J. Fitzpatrick ed.1939).

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable – by removing them from office, if necessary. See generally *Myers v. United States*, 272 U.S. 52 (1926). This Court has determined, however, that this authority is not without limit. In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers – themselves responsible to the President – to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

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29 *Id. at 723* (Scalia, J., dissenting).

30 *Id. at 723-24 & n.4, citing inter alia, Myers v. United States*, 272 U.S. 52, 127 (1926); *United States v. Perkins*, 116 U.S. 483, 485 (1886) (Congress may limit the ability of the Secretary of the Navy to dismiss a naval cadet only for “misconduct” or “the sentence of a court-martial.”).
We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot “take Care that the Laws be faithfully executed” if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's “constitutional obligation to ensure the faithful execution of the laws.”

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board [PCAOB]. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry – such as the New York Stock Exchange – that investigate and discipline their own members subject to Commission oversight.

The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). [15 U.S.C.] §§ 7217(b)(c). But the individual members of the Board – like the officers and directors of the self-regulatory organizations – are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only “for good cause shown,” “in accordance with” certain procedures. § 7211(e)(6).

Those procedures require a Commission finding, “on the record” and “after notice and opportunity for a hearing,” that the Board member “(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.” § 7217(d)(3). Removal of a Board member requires a formal Commission order and is subject to judicial review. See 5 U.S.C. §§ 554(a), 556(a), 557(a), (c)(B); 15 U.S.C. § 78y(a)(1).

As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President – or a subordinate he could remove at will – who decided whether the officer's conduct merited removal under the good-cause standard.
The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers – the Commissioners – none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene – unless that determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.” Humphrey's Executor, 295 U.S., at 620 (internal quotation marks omitted).

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws – by holding his subordinates accountable for their conduct – is impaired.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. See, e.g., PCAOB Brief 43. As Judge Kavanaugh noted in dissent below: “Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.” 537 F.3d, at 669.

The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. The dissent itself, however, stresses the very size and variety of the Federal Government, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board.

For example, many civil servants within independent agencies would not qualify as “Officers of the United States,” who “exercis[e] significant authority pursuant to the laws of the United States,”
Buckley, 424 U.S., at 126. The parties here concede that Board members are executive “Officers,” as that term is used in the Constitution. See supra, at 4; see also Art. II, § 2, cl. 2. We do not decide the status of other Government employees, nor do we decide whether “lesser functionaries subordinate to officers of the United States” must be subject to the same sort of control as those who exercise significant authority pursuant to the laws.” Buckley, supra, at 126, and n.162.

Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board’s actions, which are no less subject than the Commission’s own functions to Presidential oversight.

Justice BREYER, with whom Justice STEVENS, Justice GINSBURG, and Justice SOTOMAYOR join, dissenting.

The Court holds unconstitutional a statute providing that the Securities and Exchange Commission can remove members of the Public Company Accounting Oversight Board from office only for cause. It argues that granting the “inferior officer[s]” on the Accounting Board “more than one level of good-cause protection . . . contravenes the President’s ‘constitutional obligation to ensure the faithful execution of the laws.’” I agree that the Accounting Board members are inferior officers. But in my view the statute does not significantly interfere with the President’s “executive Power.” Art. II, § 1. It violates no separation-of-powers principle. And the Court’s contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides. Those statutes create a host of different organizational structures. Sometimes they delegate administrative authority to the President directly, e.g., 10 U.S.C. § 2031(a)(1); 42 U.S.C. § 5192(e); sometimes they place authority in a long-established Cabinet department, e.g., 7 U.S.C. § 1637b(c)(1); 12 U.S.C. § 5221(b)(2) (2006 ed., Supp. II); sometimes they delegate authority to an independent commission or board, e.g., 15 U.S.C. § 4404(b); 28 U.S.C. § 994; sometimes they place authority directly in the hands of a single senior administrator, e.g., 15 U.S.C. § 657d(c)(4); 42 U.S.C. § 421; sometimes they place it in a sub-cabinet bureau, office, division or other agency, e.g., 18 U.S.C. § 4048; sometimes they vest it in multimember or multiagency task groups, e.g. 5 U.S.C. §§ 593-594; 50 U.S.C. § 402 (2006 ed. and Supp. II); sometimes they vest it in commissions or advisory committees made up of members of more than one branch, e.g., 20 U.S.C. § 42(a); 28 U.S.C. § 991(a) (2006 ed., Supp. II); 42 U.S.C. § 1975; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators, e.g., 5 U.S.C. § 9902(a) (2006 ed., Supp. II); 7 U.S.C. § 136i-1(g); and sometimes they permit state or local governments to participate as well, e.g., 7 U.S.C. § 2009aa1(a). Statutes similarly grant administrators a wide variety of powers – for example, the power to make rules, develop informal practices, investigate, adjudicate, impose sanctions, grant licenses, and provide goods, services, advice, and so forth. See generally 5 U.S.C. § 500 et seq.
The upshot is that today vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government's work, it is not surprising that administrative units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens' song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

The Court fails to show why two layers of “for cause” protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the President's powers than one layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.

2. The President and the Commission both want to dismiss a Board member. Layer Two stops them both from doing so without cause. The President's ability to remove the Commission (Layer One) is irrelevant, for he and the Commission are in agreement.

3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President's contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.

4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two helps the President, for it hinders the Commission's ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority's decision to eliminate only Layer Two accomplishes virtually nothing. And that is because a removal restriction's effect upon presidential power depends not on the presence of a “double-layer” of for-cause removal, as the majority pretends, but rather on the real-world nature
of the President's relationship with the Commission. If the President confronts a Commission that seeks to resist his policy preferences – a distinct possibility when, as here, a Commission's membership must reflect both political parties, 15 U.S.C. § 78d(a) – the restriction on the Commission's ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to implement his policy preferences, Layer One is irrelevant, for the President and Commission see eye to eye.

In order to avoid this elementary logic, the Court creates two alternative scenarios. In the first, the Commission and the President both want to remove a Board member, but have varying judgments as to whether they have good “cause” to do so – i.e., the President and the Commission both conclude that a Board member should be removed, but disagree as to whether that conclusion (which they have both reached) is reasonable. In the second, the President wants to remove a Board member and the Commission disagrees; but, notwithstanding its freedom to make reasonable decisions independent of the President (afforded by Layer One), the Commission (while apparently telling the President that it agrees with him and would like to remove the Board member) uses Layer Two as an “excuse” to pursue its actual aims – an excuse which, given Layer One, it does not need.

Both of these circumstances seem unusual. I do not know if they have ever occurred. But I do not deny their logical possibility. I simply doubt their importance. And the fact that, with respect to the President's power, the double layer of for-cause removal sometimes might help, sometimes might hurt, leads me to conclude that its overall effect is at most indeterminate.

But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board's functions. Those who created the Accounting Board modeled it, in terms of structure and authority, upon the semiprivate regulatory bodies prevalent in the area of financial regulation, such as the New York Stock Exchange and other similar self-regulating organizations. See generally Brief for Former Chairmen of the SEC as Amici Curiae (hereinafter Brief for Former SEC Chairmen). And those organizations which rely on private financing and on officers drawn from the private sector – exercise rulemaking and adjudicatory authority that is pervasively controlled by, and is indeed “entirely derivative” of, the SEC. See National Assn. of Securities Dealers, Inc. v. SEC, 431 F.3d 803, 806 (C.A.D.C.2005).

Adhering to that model, the statute here gives the Accounting Board the power to adopt rules and standards “relating to the preparation of audit reports”; to adjudicate disciplinary proceedings involving accounting firms that fail to follow these rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal obligations. See 15 U.S.C. §§ 7211-7216. But, at the same time,

- No Accounting Board rule takes effect unless and until the Commission approves it, § 7217(b)(2);
• The Commission may “abrogat[e], delet[e] or ad[d] to” any rule or any portion of a rule promulgated by the Accounting Board whenever, in the Commission's view, doing so “further[s] the purposes” of the securities and accounting-oversight laws, § 7217(b)(5);

• The Commission may review any sanction the Board imposes and “enhance, modify, cancel, reduce, or require the remission of” that sanction if it find's the Board's action not “appropriate,” §§ 7215(e), 7217(c)(3);

• The Commission may promulgate rules restricting or directing the Accounting Board's conduct of all inspections and investigations, §§ 7211(c)(3), 7214(h), 7215(b)(1)-(4);

• The Commission may itself initiate any investigation or promulgate any rule within the Accounting Board's purview, § 7202, and may also remove any Accounting Board member who has unreasonably “failed to enforce compliance with” the relevant “rule[s], or any professional standard,” § 7217(d)(3)(C) (emphasis added);

• The Commission may at any time “relieve the Board of any responsibility to enforce compliance with any provision” of the Act, the rules, or professional standards if, in the Commission's view, doing so is in “the public interest,” § 7217(d)(1) (emphasis added).

As these statutory provisions make clear, the Court is simply wrong when it says that “the Act nowhere gives the Commission effective power to start, stop, or alter” Board investigations. On the contrary, the Commission's control over the Board's investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself: It controls the Board's budget, §§ 7219(b), (d)(1); it can assign to the Board any “duties or functions” that it “determines are necessary or appropriate,” § 7211(c)(5); it has full “oversight and enforcement authority over the Board,” § 7217(a), including the authority to inspect the Board's activities whenever it believes it “appropriate” to do so, § 7217(d)(2) (emphasis added). And it can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act, § 7217(d)(3).

What is left? The Commission's inability to remove a Board member whose perfectly reasonable actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of the President's serious concern about such a matter? Everyone concedes that the President's control over the Commission is constitutionally sufficient. See Humphrey's Executor, 295 U.S. 602; Wiener, 357 U.S. 349. And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well.

See generally PPH Corp. v. Consumer Financial Protection Board (CFPB), 881 F.3d 75 (2018) (7-3 en banc opinion) (provision President can remove CFPB Director only for “inefficiency, neglect of duty, or malfeasance in office” constitutional; does not intrude too greatly into Presidential powers).
For lower level federal employees, who are not in a policy-making role, and likely would not qualify as "Officers of the United States" who "exercis[e] significant authority pursuant to the laws of the United States," but rather are "lesser functionaries subordinate to officers of the United States," Congress can provide civil service protection from at-will Presidential firing. In a 1978 analysis, a Senate Committee estimated that there were 2.9 million civil employees on the federal payroll, of whom 93% were subject to civil service protection prohibiting suspension or removal of such employees, except as provided in 5 U.S.C. § 7503(a) for suspensions of 14 days or less, or, under 5 U.S.C. § 7513(a), for more serious action, including removal, "for such cause as will promote the efficiency of the service," which must be demonstrated at an administrative hearing. Civil service protection also typically applies to Administrative Law Judges and other Judges serving in Article I courts who do not have Article III protections of life-tenure and no diminution of salary while in office. Sometimes, however, there are proposals to restrict or amend such civil service protection, as in the Omnibus Patent Act of 1997 for patent examiners. Staff for federal judges, including secretaries and law clerks, do not have civil service protection under existing law.

2. Congress’ Power of Impeachment

Article II, § 4 of the Constitution provides, “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.” In Article I, § 2, cl. 5, the House of Representatives is granted “the sole Power of Impeachment,” which by practice includes naming House members to prosecute the case before the Senate. In Article I, § 3, cl. 6, the Senate is granted “the sole Power to try all Impeachments,” with conviction by “two thirds of the Members present,” and in cases of impeachment of a President “the Chief Justice shall preside.” The Constitution provides in Article I, § 3, cl. 7, “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualifications 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.”

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34 See Williams v. McClellan, 569 F.2d 1031, 1033 (8th Cir. 1978).
The power to impeach has rarely been used in our Nation’s history. From 1789 to 2006, only one Justice out of the 110, Samuel Chase in 1804, had been impeached, and no Justice, including Chase in 1805, and no Court of Appeals judge, had ever been convicted. As of 2003, eleven district court judges have been impeached of out more than 2,000 who have served, most on allegations of bribery, and six judges have been convicted.\textsuperscript{35}

Regarding executive officials, only two Presidents have been impeached, President Andrew Johnson in 1868 and President Bill Clinton in 1998. Neither were convicted by the Senate. Johnson’s impeachment for removing the Secretary of War without Senate approval fell one vote shy of two thirds, at 35-19. The Supreme Court has since decided that the President has the authority to fire Cabinet Secretaries at-will, discussed at § 10.2.1(B) nn.25-28. Votes on articles of impeachment for President Clinton regarding his grand jury testimony denying a sexual relationship with an intern, Monica Lewinsky, growing out of a deposition given in \textit{Clinton v. Jones}, excerpted at § 10.4.2, were: 45-55 (perjury), and 50-50 (obstruction of justice). President Richard Nixon resigned in 1974 before the House impeached him, but after a 27-9 vote of the House Judiciary Committee in favor of impeachment. Because lower federal officials typically are fired by the President or resign where credible evidence appears of an impeachable offense, only one lower federal executive official has been impeached, President Grant’s Secretary of War, William W. Belknap, in 1876. Even Belknap resigned once the House committee voted to impeach him. Congress continued the impeachment to try to impose the added punishment, discretionary with the Senate, of disqualifying him from holding office again, but the Senate vote, 37-25, failed to achieve the 2/3 majority.\textsuperscript{36}

Two main questions remain open about the relationship between judicial power and actions of Congress regarding impeachment. The first question is whether the phrase “high Crimes and Misdemeanors” is coextensive with violations of criminal law. The second issue is whether persons convicted and impeached may obtain judicial review of the impeachment proceedings.

With regard to the first question, while there are no cases on point, historical evidence suggests that use of the phrase “Misdemeanors” means that some behavior, even if not a “crime,” could be viewed by Congress as worthy of impeachment. On the other hand, not all crimes would necessarily be viewed by Congress as worthy of impeachment. This is particularly true since the remedy of impeachment was likely intended to be focused more on official misconduct, than private moral


failings. For example, proceedings surrounding the Senate’s refusal to convict President Clinton suggest that for some Senators even if the President had technically violated criminal law by lying in a deposition about a sexual affair, some violations do not rise to the level of an impeachable offense. Alternatively, even if he had not violated the law, some behavior may be impeachable in any event. As an alternative to impeachment, Congress also could “censure” a President, a resolution by either House or both that would have no force of law, although one author has argued the “shame” of a censure is an unconstitutional Bill of Attainder.

With regard to the second question, the Supreme Court held in *Nixon v. United States*, excerpted at § 4.3.2, that whether the entire Senate had to hear the evidence regarding impeachment, or whether only a committee of the Senate could hear the evidence, was a political question. The Court indicated that since the text of the Constitution states that the “Senate shall have the sole power to try all Impeachments,” the decisions how to try the impeachment, by Senate committee or the full Senate, was not reviewable by a court under the political questions doctrine. In both cases of presidential impeachment, the entire Senate heard the case. The language in the Constitution stating that the “House of Representatives . . . shall have the sole Power of Impeachment” would likely mean courts cannot review the House’s impeachment proceedings either. Thus, an impeachment offense may well be “whatever a majority of the House of Representatives considers it to be,” as then-House Minority Leader Gerald Ford famously declared in 1970.

§ 10.3 Additional Executive Separation of Powers Issues

The Court applies the same kind of separation of power analysis involving balancing concern with the need for governmental efficiency versus preventing tyranny to cases not directly involving appointment and removal issues. For example, because of a concern with legislative tyranny, and no strong arguments of governmental efficiency, the Court confirmed in *Bowsher v. Synar* its


long-held view that no executive functions can be performed by a member of the legislative branch. Thus, as an alternative ground in *Bowsher*, in addition to the problem with congressional removal, the Court held that Congress could not authorize the Comptroller General to determine what budget reductions were necessary to comply with Gramm-Rudman-Hollings Act budget guidelines because this was an “executive function" that could not be exercised by a member of the legislative branch.

In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Court held that Congress could not transfer United States airport property to a State Board where that board could make important decisions only upon approval of a Board of Review comprised of members of Congress serving on committees overseeing airport activities. The Court said that if the Board's power were executive, the Constitution would not permit an agent of Congress to exercise it, as that would transfer to the legislative branch executive responsibilities. A long line of precedents, including *Bowsher v. Synar*, as noted above, had held that unconstitutional. If the Board’s power were legislative, it had to be exercised consistent with bicameralism and presentment, as in *Chadha*. The Court noted that if this Board were valid, Congress might use similar devices to retain control of the activities of state grant recipients charged with executing federal policy.

The rule that seems to emerge from the separation of powers cases is that where constitutional text is clear, and supports a finding of unconstitutionality – such as issues surrounding the Bicameralism and Presentment Clauses in *Chadha*, excerpted at § 9.3, or the President’s veto power in *Clinton v. City of New York*, excerpted at § 9.4, or limitations on the President’s power to nominate in *Public Citizen*, noted at § 10.1 nn.7-8 – that text will prevail. Where the text is clear but supports the constitutionality of the government action, as with the Appointments Clause in *Morrison*, excerpted at § 10.1, or the text is not clear or no text exists, as in *Bowsher v. Synar*, discussed at § 10.2.1(A) nn.20-23, the Court will go beyond text and will use a balancing test to determine further whether there are any constitutional problems with the government action. That balancing test will be based upon the twin separation of powers concerns of (1) efficiency/no incongruity of action versus (2) the prevention of tyranny/no impermissible aggrandizement of power, along with consideration of legislative and executive practice and precedent, as was done in *Morrison* and *Mistretta*.

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43  In dissent, Holmesian Justices White and Rehnquist, along with instrumentalist Justice Marshall, said that *South Dakota v. Dole*, on conditional spending, placed this Board outside of separation-of-powers scrutiny. In any event, the power here was executive, not legislative, so *Chadha* did not apply. *Bowsher* was distinguished as involving greater congressional control. *Id.* at 277-93 (White, J., joined by Rehnquist, C.J., and Marshall, J., dissenting). The Court responded that *Dole* involved only federalism issues of congressional power under the Spending Clause, not the separation of power issues involved here, and that *Bowsher* had reflected a categorical rule regarding agents of Congress exercising executive powers, not a balancing test. *Id.* at 270-71.

Under this approach today, virtually all delegations of legislative power to the President or administrative agencies are constitutional. Action by the President without express or implied congressional consent, which is outside clear text, like for “Commander-in-Chief” or “take Care that the Laws be faithfully executed,” raise more serious separation of powers concerns. This is particularly true given the increased use by Presidents of Executive Orders and other presidential directives to make policy.  

Another issue that has arisen is the use of “presidential signing statements,” whereby a President signs a bill, but indicates his view that parts of the bill are unconstitutional, particularly provisions that are viewed as intruding on inherent presidential authority. As a constitutional matter, the President has the authority to express such views, and act upon them, subject to later judicial review, just as a President can view an existing statute passed before he took office as unconstitutional. Between 2001-06, President George W. Bush issued signing statements objecting to more than 700 distinct provisions of law – more than all previous presidents combined. This enhanced use has raised concerns from members of Congress and other groups, such as the American Bar Association.

Probably the best explanation for President George W. Bush’s increased use of presidential signing statements is that his advisers were driven predominantly by a formalist, strict separation of powers approach and belief in the “Unitary Executive” model of strong executive power, while Congress and the Courts have consistently adopted a non-formalist, sharing of powers approach to separation of powers issues, with greater limits on inherent executive power. These differences are summarized at § 9.1.1 nn.3-13. Since the Supreme Court has usually sided with Congress on these issues, a number of President Bush’s signing statements might not be valid if ever challenged in court, even given the Court’s willingness to tolerate some aspects of strong executive power, particularly in the field of foreign affairs.

On March 9, 2009, President Obama released a memorandum on the subject of “Presidential Signing Statements.” Indicating a more cautious approach to the use of signing statements than that of President Bush, President Obama stated, “I will ensure that signing statements identify my constitutional concerns about a statutory provision with sufficient specificity to make clear the nature and basis of the constitutional objection.” The memorandum further stated, “To ensure that all signing statements previously issued are followed only when consistent with these principles, executive branch departments and agencies are directed to seek the advice of the Attorney General before relying on signing statements issued prior to the date of this memorandum as the basis for disregarding, or otherwise refusing to comply with, any provision of a statute.”

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45 On this history of Executive Order use and questions regarding their today, see, e.g., Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. Legis. 1 (2002).

President Obama faced criticism for executive actions to waive deportation for some aliens illegally in the United States,\(^\text{47}\) and waiving for one year the employer mandate in the Affordable Care Act.\(^\text{48}\) Under a literal approach, such action could be criticized as inconsistent with the President’s responsibility to “take Care that the Laws shall be faithfully executed.”\(^\text{49}\) On the other hand, it is established executive practice that executive officials, both at the federal and state levels, have prosecutorial discretion not to enforce every law to its 100% limit.\(^\text{50}\) Such accepted executive practice would likely insulate the President from any serious attack on these actions, unless a majority of the Court switched to a literal approach to separation of powers issues. Where the President has gone beyond mere “waiving” deportation, but as part of the “waiver” making the illegal alien eligible for “work permits” or certain “social security” benefits, courts have raised more serious concerns with whether normal administrative “notice and comment” rulemaking can be waived. *See, e.g., Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (2-1 panel decision), **affirmed by an equally divided court, United States v. Texas**, 136 S. Ct. 2271 (2016).

§ 10.4  **Immunities from Legal Action**

### 1.  **Executive Immunities from Judicial Processes**

There is no constitutional text dealing with the issue of presidential immunities from judicial process. Nevertheless, based upon general separation of powers and checks and balances concerns, the Court has developed a doctrine regarding presidential immunities.

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\(^{47}\) *See* USA Today, *Obama easing deportation rules for young people* (Jun 15, 2012) (http://content.usatoday.com/communities/theoval/post/2012/06/obama-to-speak-on-new-immigration-rules/1) (deportation waived for illegal immigrants who arrived before they turned 16, are under 30, with at least five continuous years in the United States. They must either be in school, be high school graduates, have a GED or have served in the military, with no felony or significant misdemeanor convictions).


\(^{49}\) *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 Tex. L. Rev. 781 (2013) (President Obama’s actions should be viewed as unconstitutional, adopting a more literalist approach toward the “Take Care” clause).

\(^{50}\) *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (enforcement decisions “subject to agency discretion” and “unreviewable” by a court under the Administrative Procedure Act, unless Congress clearly indicates a contrary intent in the statute delegating power to the agency); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 Wm. & Mary Bill Rts. J. 463 (2012) (prosecutorial discretion common in such cases).
Under this doctrine, confidences of the President are entitled to some protection from judicial intervention. When determining the extent of immunity from judicial process, the Court has engaged in standard separation of powers balancing to determine whether the claim of the President to be free from interference in order to promote efficient operations within the executive branch outweighs the interests of the judiciary in promoting justice and preventing governmental tyranny.

In *United States v. Nixon*, \(^{51}\) excerpted below, the President claimed an absolute immunity from a judicial subpoena of documents relating to presidential conversations concerning the Watergate cover-up. In applying a balancing test, an 8-0 Supreme Court drew a distinction between a specific need for confidentiality, as exists for military, diplomatic, or sensitive national security interests, and a general need for confidentiality in other kinds of circumstances. The Court also drew a distinction between a court’s specific need for material evidence which could not be adequately obtained from other sources and a general need for background information. In *Nixon*, given only a generalized need for confidentiality by the President, and a special need for evidence by the trial court, the Court said there was not a sufficient risk that presidential advisers would temper their candor by the infrequent chance that presidential conversations would be called for in a criminal trial.\(^ {52}\)

Whether the result would have been the same had the balance of needs been different seems questionable. Thus, if the President had a specific need for confidentiality, or had the case involved a generalized need for confidentiality balanced against a generalized need for information at trial, the result might have changed. Given less important interests at stake, Presidents have never been required to provide evidence in civil trials, although sometimes Presidents have done so voluntarily.

Presidential confidentiality was also limited by the Presidential Recordings and Materials Preservation Act of 1974. That Act directed the Administrator of General Services to take custody of ex-President Nixon’s papers and tapes, to have archivists screen them, and to determinate conditions for public access. Nixon challenged the act, claiming he had an interest in presidential privacy which deserved protection. Justice Brennan conceded in *Nixon v. Administrator of General Services*\(^ {53}\) that the privilege of confidentiality could be claimed by ex-Presidents, as well as by incumbent Presidents. However, the materials here remained in the executive branch and there was no reason to believe that the restrictions on public access ultimately to be established by regulations would not be adequate to preserve executive confidentiality. A professional screening process, said the Court, was not a greater intrusion into confidentiality than the *in camera* inspection approved in *United States v. Nixon*. Balanced against the President’s claim of executive efficiency was the concern that the papers be preserved for history, particularly papers which might reveal abuses by the Nixon administration that would help keep the Nation on guard against governmental tyranny.

\(^{51}\) 418 U.S. 683, 706-13 (1974) (Burger, C.J., for the Court) (Rehnquist, J., did not participate in the case because of his service as a deputy attorney general in the Nixon Administration).

\(^{52}\) *Id.* at 713.

\(^{53}\) 433 U.S. 425, 441-55 (1977); *id.* at 504-06 (Burger, C.J., dissenting) (Act infringes on Presidential powers and need for confidentiality); *id.* at 545 (Rehnquist, J., dissenting) (same).
With regard to the taping system at issue in *United States v. Nixon*, Presidents since Franklin D. Roosevelt have occasionally taped conversations in the Oval Office, or other conversations, such as Cabinet meetings. President Lyndon B. Johnson was apparently the first President to tape all of his conversations in the Oval Office. President Nixon instituted a voice-activated taping system, which was stopped in 1973. Manually activated taping of virtually all Oval Office conversations continues to the present day.

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**United States v. Nixon**  

Chief Justice BURGER delivered the opinion of the Court.

This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States, in the case of *United States v. Mitchell* (D. C. Crim. No. 74-110), to quash a third-party subpoena duces tecum issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17(c). The President appealed to the Court of Appeals. We granted both the United States' petition for certiorari before judgment (No. 73-1766), and also the President's cross-petition for certiorari before judgment (No. 73-1834), because of the public importance of the issues presented and the need for their prompt resolution. 417 U.S. 927 and 960 (1974).

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena duces tecum was issued pursuant to Rule 17(c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena under Rule 17(c). This motion was accompanied by a formal claim of privilege.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. 377 F. Supp. 1326. It further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed," id., at 1331,
to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the Judiciary was without authority to review an assertion of executive privilege by the President.

Later on May 24, the Special Prosecutor also filed, in this Court, a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. 417 U.S. 927. On June 6, the President filed, under seal, a cross-petition for writ of certiorari before judgment. This cross-petition was granted June 15, 1974, 417 U.S. 960, and the case was set for argument on July 8, 1974.

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, Confiscation Cases, 7 Wall. 454 (1869); United States v. Cox, 342 F.2d 167, 171 (CA5), cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935 (1965), it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 42. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under Baker v. Carr, 369 U.S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

Here, as in Accardi [347 U.S. 260 (1954)], it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress.

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense,
controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." United States v. ICC, 337 U.S., at 430. The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. Id., at 198.

Having determined that the requirements of Rule 17(c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." App. 48a. The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In support of his claim of absolute privilege, the President's counsel urges two grounds . . . . The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, Humphrey's Executor v. United States, 295 U.S. 602, 629-630 (1935); Kilbourn v. Thompson, 103 U.S. 168, 190-191 (1881), insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, 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. The President's need for complete candor
and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for \textit{in camera} inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts . . . .

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. 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. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In \textit{Nixon v. Sirica}, 487 F.2d 700 (1973), the Court of Appeals held that such Presidential communications are "presumptively privileged," id., at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." \textit{United States v. Burr}, 25 F. Cas., at 192.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." \textit{Berger v. United States}, 295 U.S., at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.
The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's 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 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. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiatingly disposed of by disclosure of a limited number of conversations preliminarily shown to have any bearing on the pending criminal cases.

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. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Enforcement of the subpoena duces tecum was stayed pending this Court's [decision]. Those issues now having been disposed of, the matter of implementation will rest with the District Court. . . . Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States.

Justice REHNQUIST took no part in the consideration or decision of these cases.
Presidential authority in the area of executive privilege was enhanced by \textit{Cheney v. United States District Court for the District of Columbia}.\textsuperscript{54} In this case, a 7-2 Court held Vice President Cheney and other members of an National Energy Policy Development Group were not required to assert executive privilege before separation of powers arguments regarding Presidential confidentiality could be considered. The Court noted that executive privilege is an extraordinary assertion of power "not to be lightly invoked" and that "there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas."

On the merits, the Court noted that the balance here regarding the need for information versus the President’s need for confidentiality was different than in \textit{Nixon}. The Court noted:

\begin{quote}
[W]hen compared against \textit{United States v. Nixon}'s criminal subpoenas, which did involve the President, the civil discovery here militates against respondents' position. The observation in \textit{Nixon} that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here. Although under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys also owe an obligation of candor to the judicial tribunal, these safeguards have proved insufficient to discourage the filing of meritless claims against the Executive Branch. "In view of the visibility of" the Offices of the President and the Vice President and "the effect of their actions on countless people," they are "easily identifiable targets for suits for civil damages."

[T]he narrow subpoena orders in \textit{United States v. Nixon} stand on an altogether different footing from the overly broad discovery requests approved by the District Court in this case. The criminal subpoenas in \textit{Nixon} were required to satisfy exacting standards of "(1) relevancy; (2) admissibility; (3) specificity." They were "not intended to provide a means of discovery." The burden of showing these standards were met . . . fell on the party requesting the information.\textsuperscript{55}
\end{quote}

Numerous commentators have explored the separation of powers issues involved in these cases, including whether or not executive privilege is officially invoked, and such issues have naturally arisen in both Republican and Democratic Administrations.\textsuperscript{56}

\begin{thebibliography}{99}
\item \textsuperscript{54} 542 U.S. 367, 389-90 (2004); \textit{id}. at 396 (Ginsburg, J., joined by Souter, J., dissenting).

\item \textsuperscript{55} \textit{id}. at 386-87 (Kennedy, J., for the Court) (citations omitted).

\item \textsuperscript{56} See, e.g., \textit{Symposium Thirty-Second Annual Administrative Law Issue Politics and Policy: Executive Privilege and the Bush Administration}, 52 Duke L.J. 323-421 (2002); \textit{Symposium:}
\end{thebibliography}

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2. Immunity from Damage Actions

With respect to damage claims for official presidential acts, even those within the "outer perimeter" of official responsibility, a 5-4 Court adopted a test of absolutely immunity in *Nixon v. Fitzgerald*, excerpted below, rather than a balancing test. The Court reserved the question whether Congress could create a damage action against the President on behalf of wronged individuals. In a concurrence, Chief Justice Burger indicated that he believed the question of whether Congress could create such a damage award was implicitly settled by the majority in the negative, since the decision in *Fitzgerald* was based on constitutional grounds and Congress cannot overrule a constitutional decision by statute. For a formalist judge, like Burger, who places little weight in constitutional decisionmaking on legislative and executive practice, this conclusion would appear warranted. His conclusion is also consistent with the conservative predisposition toward the executive branch in checks and balances cases, as discussed at § 9.1.1 n.14. However, for non-formalist judges, if there were legislative practice supporting a damage award against the President, that practice would need to be considered in the Court’s constitutional analysis of the doctrine regarding presidential immunities. Perhaps for this reason, the majority in *Fitzgerald* reserved the question of congressional power to create a damage action against the President.

A further issue of presidential immunity involves the question whether the President has an immunity from having to defend, while President, civil damages in litigation arising out of events that occurred before he took office, or events while in office which are not part of his “official” responsibilities. In 1997, the Supreme Court considered *Clinton v. Jones*, excerpted below, a case involving both of these elements. As the alleged activity, sexual harassment, occurred before President Clinton became President, there was no question of ultimate presidential immunity from lawsuit. The only issue was whether President Clinton had immunity while President from being sued, as the lawsuit might distract the President from presidential obligations.

It seems the critical point of difference between *Jones* and *Fitzgerald* in the *Jones* Court’s view was the official or non-official character of the activities being the subject of the lawsuit, rather than the activities in *Jones* occurring before Clinton became President. Under this interpretation, a sitting President who was alleged to engage in sexual harassment while President could also have this kind of lawsuit brought while serving as President. Despite this conclusion, language in *Fitzgerald* indicated that it “would deprive absolute immunity of its intended effect” if the President could be subjected to trial on “virtually every allegation that an action was unlawful, or was taken for a forbidden purpose.” The Court in *Fitzgerald* thus indicated that possibly a case for damages could not be brought against the President for a “forbidden purpose” even if the President’s action was not

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*Executive Privilege and the Clinton Presidency, 8 Wm. & Mary Bill. Symposium 535-692 (2000); Brian D. Smith, A Proposal to Codify Executive Privilege, 70 Geo. Wash. L. Rev. 570 (2002).*

57 457 U.S. 731, 748-63 (1982); id. at 748 n.27 (Powell, J., opinion); id. at 763 n.7 (Burger, C.J., concurring); id. at 764 (White, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting).

58 520 U.S. 681, 694-95, 701-10 (1997).
based on official authority to act.\textsuperscript{59} A later Supreme Court wishing to limit the \textit{Jones} decision predominantly to cases of activities that occurred before the President took office, the core holding of \textit{Jones} given its facts, could use this language in \textit{Fitzgerald} to limit inquiry into almost all activities of a sitting President, although such an interpretation would seem to be at odds with the general reasoning given in the \textit{Jones} opinion that \textit{Fitzgerald’s} reasoning “provides no support for an immunity for \textit{unofficial} conduct.”\textsuperscript{60}

\textbf{Nixon v. Fitzgerald}
\textit{457 U.S. 731 (1982)}

Justice POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the Armed Forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the Presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A transport plane could approximate $2 billion. He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that “‘Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.’” Butterfield therefore recommended that “‘[W]e should let him bleed, for a while at least.’” There is no evidence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

\textsuperscript{59} Fitzgerald, 457 U.S. at 756-57.

\textsuperscript{60} Jones, 520 U.S. at 694.
The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States. . . .” This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to “take Care that the Laws be faithfully executed”; the conduct of foreign affairs—a realm in which the Court has recognized that “[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret”; and management of the Executive Branch—a task for which “imperative reasons require [e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.”

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to “arouse the most intense feelings.” Pierson v. Ray, 386 U.S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official “the maximum ability to deal fearlessly and impartially with” the duties of his office. Ferri v. Ackerman, 444 U.S. 193, 203 (1979). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

Justice WHITE, with whom Justice BRENAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting

We have previously stated that “the law of privilege as a defense to damages actions against officers of Government has ‘in large part been of judicial making.’” Butz v. Economou, 438 U.S., at 501-502, quoting Barr v. Matteo, 360 U.S. 564, 569 (1959). But this does not mean that the Court has simply “enacted” its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts
have been guided and constrained by common-law tradition, the relevant statutory background, and our constitutional structure and history. Our cases dealing with the immunity of Members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve the question of whether and to what extent Congress intended to abolish the common-law privileges by providing a remedy in the predecessor of 42 U.S.C. § 1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials—including absolute immunity for judges, prosecutors, and those officials doing similar work—also in large part reflect common-law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

Unfortunately, there is little of this approach in the Court's decision today. The Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with officewide, absolute immunity. This is policy, not law, and in my view, very poor policy.

Clinton v. Jones
520 U.S. 681 (1997)

Justice STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

Petitioner, William Jefferson Clinton, was elected to the Presidency 1992, and re-elected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants. The complaint alleges two federal claims, and two state law claims over which the federal court has jurisdiction because of the diverse citizenship of the parties. As the case comes to us, we are required to assume the truth of the detailed – but as yet untested – factual allegations in the complaint.
Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent – working as a state employee – staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made "abhorrent" sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner's alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred.

The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency. 869 F. Supp. 690 (E.D Ark. 1994). Although she recognized that a "thin majority" in Nixon v. Fitzgerald, 457 U.S. 731 (1982), had held that "the President has absolute immunity from civil damage actions arising out of the execution of official duties of office," she was not convinced that "a President has absolute immunity from civil causes of action arising prior to assuming the office." She was, however, persuaded by some of the reasoning in our opinion in Fitzgerald that deferring the trial if one were required would be appropriate. 869 F. Supp. at 699-700. Relying in part on the fact that respondent had failed to bring her complaint until two days before the 3-year period of limitations expired, she concluded that the public interest in avoiding litigation that might hamper the President in conducting the duties of his office outweighed any demonstrated need for an immediate trial. Id., at 698-699.

Both parties appealed. A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss, but because it regarded the order postponing the trial until the President leaves office as the "functional equivalent" of a grant of temporary immunity, it reversed that order.

The President, represented by private counsel, filed a petition for certiorari. The Solicitor General, representing the United States, supported the petition, arguing that the decision of the Court of Appeals was "fundamentally mistaken" and created "serious risks for the institution of the Presidency." In her brief in opposition to certiorari, respondent argued that this "one-of-a-kind case is singularly inappropriate" for the exercise of our certiorari jurisdiction because it did not create any conflict among the Courts of Appeals, it "does not pose any conceivable threat to the functioning of the Executive Branch," and there is no precedent supporting the President's position.

While our decision to grant the petition expressed no judgment concerning the merits of the case, it does reflect our appraisal of its importance. The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration.

[W]hen defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach. "Frequently our decisions have held that an official's absolute
immunity should extend only to acts in performance of particular functions of his office." [Fitzgerald, 457 U.S.] at 755. Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative capacity. See Forrester v. White, 484 U.S. 219, 229-230 (1988). As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it." Id., at 229.

Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation of powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that – given the nature of the office – the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that – as a by-product of an otherwise traditional exercise of judicial power – burdens will be placed on the President that will hamper the performance of his official duties. . . . As a factual matter, petitioner contends that this particular case – as well as the potential additional litigation that an affirrnance of the Court of Appeals judgment might spawn – may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

[O]f greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. "Our . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" Mistretta, 488 U.S.
at 381 (quoting Buckley, 424 U.S. at 121). As Madison explained, separation of powers does not mean that the branches "ought to have no partial agency in, or no control over the acts of each other." The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. Our holding was an application of the principle established in Marbury v. Madison, 5 U.S. 137 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." Id., at 177.

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena duces tecum could be directed to the President. United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807). We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. United States v. Nixon, 418 U.S. 683 (1974). As we explained, "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." Id., at 706.

Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty. President Monroe responded to written interrogatories, see Rotunda, Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote, 1975 U. Ill. L. F. 1, 5-6, President Nixon – as noted above – produced tapes in response to a subpoena duces tecum, see United States v. Nixon, President Ford complied with an order to give a deposition in a criminal trial, United States v. Fromme, 405 F. Supp. 578 (ED Cal. 1975), and President Clinton has twice given videotaped testimony in criminal proceedings, see United States v. McDougal, 934 F. Supp. 296 (ED Ark. 1996); United States v. Bransecum, No., LRP-CR-96-49 (ED Ark., June 7, 1996). Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case under such circumstances, R. Rotunda & J. Nowak, Treatise on Constitutional Law § 7.1 (2d ed. 1992), and President Carter similarly gave videotaped testimony for use at a criminal trial, ibid.
In sum, "it is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." Fitzgerald, 457 U.S. at 753-754. If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay "in all but the most exceptional cases." Brief for Petitioner I. Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" subcategory. In all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution. Accordingly, we turn to the question whether the District Court's decision to stay the trial until after petitioner leaves office was an abuse of discretion.

The Court of Appeals described the District Court's discretionary decision to stay the trial as the "functional equivalent" of a grant of temporary immunity. 72 F.3d at 1361, n.9. Concluding that petitioner was not constitutionally entitled to such an immunity, the court held that it was error to grant the stay. Ibid. Although we ultimately conclude that the stay should not have been granted, we think the issue is more difficult than the opinion of the Court of Appeals suggests.

Strictly speaking the stay was not the functional equivalent of the constitutional immunity that petitioner claimed, because the District Court ordered discovery to proceed. Moreover, a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity. The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. See, e.g., Landis v. North American Co., 299 U.S. 248, 254 (1936). As we have explained, "especially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Id., at 256. Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.

Nevertheless, we are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period – albeit near the end of that period – and delaying trial would increase
the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment. History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition—especially in matters involving national security—of giving "the utmost deference to Presidential responsibilities." Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests. Brief for Petitioner 34-36. See, e.g., 11 U.S.C. § 362 (litigation against debtor stayed upon filing of bankruptcy petition); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-525 (provisions governing, inter alia, tolling or stay of civil claims by or against military personnel during course of active duty). If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

With respect to potential burdens litigation might impose on a President, Justice Stevens concluded that "most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant." The accuracy of this statement is somewhat belied by *Clinton v. Jones*, which was dismissed by the district court on a summary judgment motion, and then settled by the parties while that summary judgment was on appeal to the Eighth Circuit Court of Appeals. Despite this truncated process, defending the case cost President Clinton more than $5 million in legal fees, and since the case did not involve his official actions as President, the government might not have been legally required to pay the cost of Clinton’s defense.
The predominant view, and the consistent view of the Department of Justice, is that the President cannot be criminally indicted while in office, as that would inevitably too greatly interfere with the President’s ability to run effectively his Administration. Thus, the prosecutor would have wait until the President left office, with any applicable statute of limitations tolled during the period of immunity from indictment. Under this view, if the alleged criminal conduct of the President was sufficiently serious, Congress would have to impeach and convict the President first, and then the criminal indictment could proceed. A minority of commentators have taken the opposing view.61

In the case of President’s Clinton’s alleged perjury and obstruction of justice in the Paula Jones case, noted at § 10.2.2 n.36, the Independent Prosecutor struck a deal with President Clinton on Clinton’s last day in office which dropped any indictment in exchange for President Clinton acknowledging in a published January 19, 2001 letter that he “knowingly violated Judge Wright’s discovery orders in my deposition in that case”; promising not to “seek any legal fees incurred as a result of the Lewinsky investigation to which I might otherwise become entitled under the Independent Counsel Act”; and signing a consent order in a lawsuit brought by the Arkansas Committee on Professional Conduct dismissing a disbarment suit in exchange for Clinton agreeing to a five-year suspension of his law license in Arkansas, $25,000 in fines, and “acknowledging a violation of one of the Arkansas model rules of professional conduct because of testimony in my Paula Jones case deposition.”

3. Immunities of Other Government Actors from Legal Action

A. Lower Federal Officials and State Officials Sued Under § 1983

During the formalist era, federal officials were granted an absolute immunity from damages for official actions, similar to the immunity later granted to the President in Nixon v. Fitzgerald. Drawing upon principles of immunity developed by English courts at common law, the Court concluded in 1896 in Spalding v. Vilas62 that the “interests of the public” required a grant of absolute immunity so that executive officials would not hesitate to take bold action for fear of lawsuits that would “seriously cripple the proper and effective administration of public affairs.” The doctrine did not apply to actions that violated the Constitution, however, since an unconstitutional act could not be one the official was authorized to commit.63 These decisions reflected the conservative pro-executive mindset of the formalist-era Justices, as well as their preference for clear bright-line rules.

61 See Randall K. Miller, Presidential Sanctuaries After the Clinton Sex Scandals, 22 Harv. J.L. & Pub. Pol’y 647, 678-82 (1999) (if the Constitution does not grant immunity from prosecution while in office, Congress should provide for immunity by statute); Eric M. Freedman, The Law as King and the King as Law: Is a President Immune From Criminal Prosecution Before Impeachment, 20 Hastings L.Q. 7 (1992) (President not immune). President Franklin Pierce was arrested in 1853 for running over an old woman with his horse, but the case was dropped due to insufficient evidence.


This doctrine of immunity was continued during the Holmesian era, based on the Holmesian posture of deference to government. Indeed, during the first part of the instrumentalist era, a four-Justice Holmesian plurality in 1959 followed *Spalding* in *Barr v. Matteo* to immunize an agency director from being sued for defamation. Formalist Justice Black concurred with the majority’s result, also citing *Spalding* as authority.64 Liberal instrumentalists Chief Justice Warren and Justices Douglas and Brennan dissented, foreshadowing the instrumentalist approach towards executive immunity of the 1970s. Holmesian Justice Stewart, while agreeing with the majority’s statement of the correct legal test, disagreed that the agency director was acting within the scope of his official responsibilities when he issued the press release on which the claim of defamation was based.65

During the 1970s, an instrumentalist-inspired majority in 1974 and 1978 rejected the categorical approach of *Spalding*, and instead adopted a functional test that grants to federal officials other than the President only a qualified immunity, except where it is shown that their functions are so sensitive as to require absolute immunity.66 As applied in 1978 in *Butz v. Economou*,67 the Court determines whether a function is so sensitive under the so-called “special functions” exception by weighing the factors of the historical or common-law basis for the immunity, asking whether the task is sufficiently analogous to judicial or quasi-judicial activity for which absolute immunity is granted, and whether other checks exist on official misconduct. Under *Butz*, if absolute immunity does not attach, there is only a qualified immunity from being sued for damages, which applies unless the official’s conduct was objectively unreasonable in light of clearly established statutory and constitutional law at the time the act was performed.68 In applying the *Butz* test, conservative judges tend to favor a finding in close cases that the conduct was objectively reasonable or that the law was not clearly established, thus granting immunity to the executive official. Liberal judges tend to make the opposite findings, thus being more willing to impose liability.69

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64 360 U.S. 564, 571-755 (1959) (plurality opinion of Harlan, J., joined by Frankfurter, Clark & Whittaker, JJ.); *id.* at 576 (Black, J., concurring).

65 *Id.* at 578 (Warren, C.J., joined by Douglas, J., dissenting); *id.* at 586 (Brennan, J., dissenting); *id.* at 586 (Stewart, J., dissenting).


68 *Id.* at 506-08.

In applying the *Butz* test, the Court has had to decide whether “objective reasonableness” should be determined only by looking to objective evidence of whether a reasonable person would have known the actions violated statutory or constitutional requirements, or whether subjective evidence of the party’s actual mental state can be used to show that the party understood the actions violated statutory or constitutional law. In 1982, the Court held in *Harlow v. Fitzgerald*\(^{70}\) that because resolving evidence concerning the party’s subjective mental state would often preclude the ability to decide immunity issues at summary judgment, and this would subject the executive branch to greater costs in defending litigation, the test is a pure objective one concerning what “a reasonable person would have known” and that “allegations of malice” are not relevant.

In a case with important implications in the era of terrorism after September 11, 2001, the Court held in 1985 in *Mitchell v. Forsyth* that the Attorney General does not have absolute immunity in authorizing a warrantless wiretap on grounds of national security. The Court stated:

First, in deciding whether officials performing a particular function are entitled to absolute immunity, we have generally looked for a historical or common-law basis for the immunity in question. The legislative immunity . . . was rooted in the long struggle in both England and America for legislative independence, a presupposition of our scheme of representative government. The immunities for judges, prosecutors, and witnesses established by our cases have firm roots in the common law. Mitchell points to no analogous historical or common-law basis for an absolute immunity for officers carrying out tasks essential to national security.

Second, the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or "quasi-judicial" tasks that have been the primary wellsprings of absolute immunities. . . . National security tasks . . . are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation. Whereas the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process, it is unlikely to have a similar effect [in this case].

Third, most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed. Legislators are accountable to their constituents, and the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions . . . . Similar built-in restraints on the Attorney General’s activities in the name of national security, however, do not exist . . . . The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.\(^{71}\)


\(^{71}\) 472 U.S. 511, 521-23 (1985).
Thus, only a qualified immunity protected the Attorney General, and it would not apply if there was a violation of clearly established statutory or constitutional rights. In Mitchell, the Attorney General was held not liable because the law was unclear when the action was taken.

Under the Harlow test, whether (1) the law was clearly established and (2) whether an objectively reasonable official should have known the behavior was unlawful, are questions of law for the court, not fact questions for a jury, and decisions regarding immunity are immediately appealable, so the government does not have to endure the costs of a trial before an adverse decision on immunity can be appealed. This qualified immunity for lower federal officials also applies to state officials, such as when such officials are sued for constitutional violations under 42 U.S.C. § 1983.

### B. Judicial Immunity and Congressional Interference with Courts

Both federal and state court judges are immune from federal lawsuits, even if bad faith or malice is alleged, except for actions not taken in the judge's official capacity, such as taking a bribe, or actions taken in the complete absence of jurisdiction. For example, in Mireles v. Waco, the Court held there was no action under § 1983 even if the state court judge ordered police officers, in a criminal proceeding, to "forcibly and with excessive force seize and bring plaintiff into his courtroom." The Court reasoned that the judge's action was taken in aid of his jurisdiction over a matter before him. State supreme courts provide similar judicial immunity for state court judges rendering decisions on state law.

A second kind of protection that Article III federal judges have involves the life-tenure and salary protections of Article III. Under Article III, § 1, “the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” Regarding the “no diminution in salary” provision, the Court held in United States v. Will that Congress could repeal a cost-of-living increase for judicial salaries that had not yet taken effect. This suggests that Congress does not have to account for the devaluation effects of inflation upon judicial compensation, at least in normal circumstances. In a time of hyperinflation, the Court might read the Clause in light of its purpose to provide a reasonable, non-punitive salary be paid. While proposals have occasionally been made to limit these constitutional protections, no serious momentum exists for any constitutional amendment along these lines. The life-tenure provision is relatively unique among countries in the world, with most European constitutional courts limiting appointment from 6-12 years, as noted at § 1.4 n.60.

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C. Legislative Immunities from Suit

Article I, § 6, cl.1 of the Constitution provides that “Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.” The main issues regarding the Privilege from Arrest and Speech or Debate Clauses concern whether to give them a literal interpretation, or whether to read them in light of their purposes to support checks and balances theory. The basic purpose of these clauses is to permit the legislative process to function without the threat of executive-inspired and judicially-supported investigations.

Not surprisingly, the Court has rejected a formalist, literal interpretation of these clauses, and read them in light of their evident purposes, an interpretation also supported by history. Regarding the Arrest Clause, such an interpretation has resulted in a narrower interpretation of the Clause than would be obtained from a literal interpretation. In 1972, the Court stated in *Gravel v. United States*:

History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only. “When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies.” “[T]he term treason, felony, and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses . . . .” Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, or as a witness in a criminal case. . . . It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.76

With regard to the Speech or Debate Clause, the Court has similarly rejected a literal interpretation. In this case, however, such an interpretation has expanded the scope of the Clause. For example, while literally the Speech or Debate Clause only applies to “Senators and Representatives,” the Court noted in *Gravel* that it also applies to the Senator’s or Representative’s staff, because without staff the legislative process could not effectively function; further, while the Clause literally applies only to “Speech or Debate in either House,” the Court has held that it applies equally to other aspects of the legislative process, such as speech in Committee hearings.77 The Court has never decided whether this immunity is personal to the individual, or could be waived institutionally by the Congress, but concern with possible retaliation by one party in control of both houses of

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77 *Id.* at 616-18. Such immunity naturally applies if such statements are shown live on C-Span, or reshowed later on a television program, or the content republished in a newspaper article.
Congress against the other party suggest that right should be personal to the member of Congress. A similar doctrine confers absolute immunity from liability under 42 U.S.C. § 1983 to state or local legislators, or regional legislators acting pursuant to interstate compacts, for legislative activities.

In *Hutchinson v. Proxmire*, the Court held that the Speech and Debate Clause does not immunize a Senator from suit for defamatory statements made in press releases or newsletters, or when stated in person on television interview programs, as that kind of activity is not part of the legislative process. In addition, while the Speech or Debate Clause might protect telephone calls from a member of Congress to an executive agency seeking information, it “does not protect attempts to influence the conduct of executive agencies or libelous comments made during the conversations.” Justice Stewart dissented from this part of the majority’s analysis. As he did in *Gravel*, Justice Brennan dissented from all of the majority’s reasoning, viewing each of Senator Proxmire’s acts as protected as part of his legislative responsibilities, and thus part of “Speech or Debate.”

Based upon the same kind of reasoning as in *Gravel* and *Hutchinson*, a member of Congress can be prosecuted for accepting a bribe in exchange for a promise to perform a legislative act in the future, as bribery is not part of the legislative process. Evidence relating to the member’s actual voting record is protected, however, since that involves legislative activities.

**D. Sovereign Immunity of the United States from Suit**

When suing the United States, a plaintiff must show a waiver of the federal government's sovereign immunity. Absent such waiver, the court lacks subject matter jurisdiction. As has been noted:

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81 *Id.* at 136 (Stewart, J., dissenting in part); *id.* at 136 (Brennan, J., dissenting).

82 United States v. Helstoski, 442 U.S. 477, 487-92 (1979). *See also* United States v. Renzi, 769 F.3d 731 (9th Cir. 2014) (if a member of Congress offers evidence of legislative acts, government narrowly confined rebuttal evidence does not constitute “questioning” under Speech or Debate Clause); Reeder v. Madigan, 780 F.3d 799 (7th Cir. 2015) (decision to grant or deny a reporter press credentials is legislative); Menendez v. United States, 831 F.3d 155, 166-69 (3rd Cir. 2016) (alleged illegal lobbying activities by Senator Menendez not protected, because considering “content, purpose, and motive” the district court found Senator Menendez had not met his burden to show by a preponderance of the evidence that his lobbying activities were legitimate legislative “oversight” of the executive branch, rather than a non-legislative attempt to influence executive branch action; that factual decision is not “clearly erroneous” – and thus affirmed on appeal – and consideration of “motive” is appropriate where the act is not clearly legislative or non-legislative, but “ambiguously legislative.”).
[The Supreme Court has stated that] “waiver[s] of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text”; they may not be implied or inferred. "Waivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." [As with state immunity] any waiver must appear clearly in the statutory text[;] legislative history cannot be used to clarify an ambiguity.

While many federal statutes waive the government's immunity from suit, several are notable. The Tucker Act of 1887, one of the first broad waivers of the United States' sovereign immunity, authorizes suits seeking damages against the United States based on the Constitution, statutes, regulations, or contracts. The Federal Tort Claims Act of 1946 (FTCA) waives the United States' sovereign immunity from certain tort claims arising from the conduct of federal employees. The Quiet Title Act of 1972 (QTA) waives the government's immunity from "civil actions to adjudicate title disputes involving real property in which the United States claims an interest." The most notable of the many statutes . . . is the Administrative Procedure Act (APA). When Congress eliminated the amount in controversy requirement from suits against federal agencies and officers in 1976, it also added a waiver of sovereign immunity to § 702 of the APA. The APA now provides both a cause of action and a waiver of sovereign immunity in suits against federal agencies seeking relief other than money damages.83

In addition, as Professor Kovacs noted, the plaintiff must identify a cause of action – a "source of substantive law . . . [that] provides an avenue for relief."84 Also, the court must have subject matter jurisdiction, usually supplied by 28 U.S.C. § 1331, dealing with jurisdiction for federal questions.

While Congress has enacted many statutory waivers of sovereign immunity, those waivers have holes through which a plaintiff might fall. The doctrine of “nonstatutory review" fills those gaps by allowing suits against officers of the United States for injunctive relief in the absence of a statutory waiver of immunity. For example, the Court held in Noble v. Union River Logging Railroad Co.85 that a federal official may be enjoined where he has acted "ultra vires, and beyond the scope of his authority." In addition, "[i]f he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do." Since the inclusion of a broad waiver of sovereign immunity in the APA in 1976, nonstatutory review has fallen into disuse. The modern Court will likely ground any waivers of federal sovereign immunity on congressional action, as in Sosa v. Alvarez-Machain.86


85 147 U.S. 165, 171-72 (1893).

CHAPTER 11: FOREIGN POLICY MATTERS

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§ 11.1 Text of the Constitution and Cases Before 1937

Many of the enumerated powers relating to foreign affairs are granted to Congress. In Article I, § 8, cl. 1, Congress has power to tax and spend for the common defense of the United States. Congress can influence foreign affairs with its powers in Article I, § 8, cl. 3 to “regulate commerce with foreign Nations . . . and with the Indian Tribes”; in Article I, § 8, cl. 4 to “establish an uniform Rule of Naturalization”; and in Article I, § 8, cl. 10 to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” Congress also has the power Article I, § 8, cl. 11-16: “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 term longer 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 [today termed the state National Guards] to execute the Laws of the Union, suppress Insurrections and repel Invasions”; and “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.” Under Article II, § 2, cl. 2, the Senate can refuse to consent to treaties by less than a 2/3 vote of those present.

Under Article II, § 2, cl. 1, the President is “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.” Under Article II, § 2, cl. 2, the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” The President is the repository for all information coming from United States Ambassadors, the Department of State, the Department of Defense, the National Security Council, the CIA, as well as other federal agencies. Under Article II, § 3, the President receives “Ambassadors and other public Ministers” of foreign countries. Under Article II, § 2, cl. 2, the President has the power to negotiate treaties, which then become ratified if “two thirds of the Senators present concur.”

In addition, it can be argued that the President enjoys a "residual" foreign affairs power under Article II, § 1's grant of "the executive Power." It has been noted, “the ordinary eighteenth-century meaning of executive power – as reflected, for example, in the works of leading political writers known to the constitutional generation, such as Locke, Montesquieu, and Blackstone – included foreign affairs
powers. . . . To slight the foreign affairs meaning of executive power is to downplay Locke, Montesquieu, Blackstone, Washington, Jay, Jefferson, Hamilton, and even Madison.”1 On the other hand, it has been noted that Locke and other 18th-century natural law writers distinguished the “executive power,” which was the power to execute laws, from the “federative” power, or other such term, which was a power over foreign affairs. While Article II did vest “executive” power in the President, the “federative” power was split between Congress and the President in various constitutional provisions dealing with declaring war, negotiating and ratifying treaties, nomination and confirmation of Ambassadors, and the like.2

In practice, Congress has often allowed the President to take the lead in foreign affairs. In terms of judicial precedents, there are a few cases, particularly from the formalist era, that speak in terms of broad presidential power in the foreign affairs realm. For example, in 1936, in a case where Congress had in any event authorized the President to embargo arms sales to certain countries, the Court said in United States v. Curtiss-Wright Export Co. that the President has great power to negotiate with foreign countries even without congressional directive. The Court described the President as “the sole organ of the federal government in the field of international relations.”

Curtiss-Wright Export Corp. v. United States 299 U.S. 304 (1936)

Justice SUTHERLAND delivered the opinion of the Court.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. The Joint Resolution (chapter 365, 48 Stat. 811) follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of


other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

"Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

The President's proclamation (48 Stat. 1744, No. 2087), after reciting the terms of the Joint Resolution, declares:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the law-making power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
The two classes of powers are different, both in respect of their origin and their nature. 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 it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U.S. 238, 294. 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. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

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. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See Penhallow v. Doane, 3 Dall. 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Brittanic Majesty and the "United States of America." 8 Stat., European Treaties, 80.

The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one. Compare The Chinese Exclusion Case, 130 U.S. 581, 604, 606. In that convention, the entire absence of state power to deal with those affairs was thus forcefully stated by Rufus King:

"The states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty, – they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs
or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war." 5 Elliott's Debates 212.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (Jones v. United States, 137 U.S. 202, 212), the power to expel undesirable aliens (Fong Yue Ting v. United States, 149 U.S. 698, 705 et seq.), the power to make such international agreements as do not constitute treaties in the constitutional sense (Altman & Co. v. United States, 224 U.S. 583, 600-601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

In *Burnet v. Brooks*, 288 U.S. 378, 396, we said, "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." Cf. *Carter v. Carter Coal Co.*, supra, p. 295.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the 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. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

"The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of
transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch. U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty – a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents, p. 194.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.
Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. Many, though not all, of these acts are designated in the footnote.

The judgment of the court below must be reversed and the cause remanded for further proceedings in accordance with the foregoing opinion.

Justice McREYNOLDS does not agree. He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.

Justice STONE took no part in the consideration or decision of this case.

§ 11.2 Managing Foreign Policy in the Post-1937 Era

Deference to presidential leadership in foreign affairs has continued since 1937. Based upon practice and precedent, the Holmesian-era Court held in United States v. Belmont and United States v. Pink that presidents have the constitutional power to enter into presidential executive agreements and other such international “compacts” with foreign nations without obtaining the Advice and Consent of the Senate, as is required for treaties, and that such agreements, like treaties, supercede contrary state laws. The language of these opinions reflect strong deference to President Roosevelt during the 1930s and 1940s.

Reflecting a slightly less deferential approach toward the executive than during the Roosevelt presidency, in 1981 an instrumentalist Court stated in Dames & Moore v. Regan, excerpted below, that the President only has "some measure of power" to enter into executive agreements without obtaining the Advice and Consent of the Senate. The Court held very narrowly, “Critical to our decision today is the conclusion that Congress has implicitly authorized the practice of claim settlement by executive agreement... Where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.”

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3 301 U.S. 324 (1937).
Nonetheless, many cases from the instrumentalist era suggest broad Presidential power over foreign affairs matters. Even those commentators who tend to have a bias more toward the legislative branch acknowledge the growth of presidential power in foreign affairs and resulting changes as a matter of legislative and executive practice in constitutional practice. Of course, in terms of court decisions, many specific issues of congressional versus executive power concerning foreign affairs, including the difficult issue, never squarely litigated, of presidential authority to enter into executive agreements absent any congressional authorization, may be viewed as political questions, as a 4-Justice plurality of the Court concluded in Goldwater v. Carter regarding the President’s power unilaterally to terminate a treaty, noted at § 4.3.1(D) nn.56-60. Resolution of such issues would then turn on non-judicial factors, like congressional control over appropriations for the Department of Defense or State, Senate control over confirmation of executive nominations, impact of public opinion, or, in extreme cases, the congressional impeachment power.

Dames & Moore v. Regan

Justice REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the matter in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the

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6 See Jefferson Powell, The Founders and the President's Authority over Foreign Affairs, 40 Wm. & Mary L. Rev. 1471, 1473 n.7 (1999) (collecting cases) (Sale v. Haitian Ctrs. Council, 509 U.S. 155, 188 (1993) (Stevens, J., writing for an eight-justice majority) (citing Curtiss-Wright in referring to the "foreign and military affairs for which the President has unique responsibility"); Webster v. Doe, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and dissenting in part) (quoting Curtiss-Wright's description of the President's "delicate, plenary and exclusive power"); Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (Powell, J., writing for an eight-justice majority) (referring to "such 'central' Presidential domains as foreign policy and national security, in which the President [has a] singularly vital mandate"); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (Rehnquist, J., plurality opinion) (noting that "this Court has recognized the primacy of the Executive in the conduct of foreign relations [and] emphasized the lead role of the Executive in foreign policy"); New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., joined by White, J., concurring) (explaining that "the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs"); id. at 756 (Harlan, J., dissenting) (stating that the President has "constitutional primacy in the field of foreign affairs"); Ward v. Skinner, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, C.J.) (arguing that "the Constitution makes the Executive Branch . . . primarily responsible" for the "foreign affairs power")).

Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in The Federalist Papers at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis de Tocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, “[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers “did not make the judiciary the overseer of our government.” Id., at 594 (Frankfurter, J., concurring). We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran. We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson – that we decide difficult cases presented to us by virtue of our commissions, not our competence – is especially true here. We attempt to lay down no general “guidelines” covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U.S.C. §§ 1701-1706 (1976 ed., Supp. III) (hereinafter IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of “all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . .” Exec. Order No. 12170, 3 CFR 457 (1980), note following 50 U.S.C. § 1701 (1976 ed., Supp. III). President Carter authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing that “[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other
judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran.” 31 CFR § 535.203(e) (1980). The regulations also made clear that any licenses or authorizations granted could be “amended, modified, or revoked at any time.” § 535.805.

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the “entry of any judgment or of any decree or order of similar or analogous effect . . . .” § 535.504(a). On December 19, 1979, a clarifying regulation was issued stating that “the general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment.” § 535.418.

On December 19, 1979, petitioner Dames & Moore filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Under the contract, the subsidiary was to conduct site studies for a proposed nuclear power plant in Iran. As provided in the terms of the contract, the Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed $3,436,694.30 plus interest for services performed under the contract prior to the date of termination. The District Court issued orders of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. Declaration of the Government of the Democratic and Popular Republic of Algeria (App. to Pet. for Cert. 21-29), and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (id., at 30-35). The Agreement stated that “[i]t is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.” Id., at 21-22. In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be “final and binding” and “enforceable . . . in the courts of any nation in accordance with its laws.” Id., at 32. Under the Agreement, the United States is obligated “to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.” Id., at 22.

In addition, the United States must “act to bring about the transfer” by July 19, 1981, of all Iranian assets held in this country by American banks. Id., at 24-25. One billion dollars of these assets will
be deposited in a security account in the Bank of England, to the account of the Algerian Central Bank, and used to satisfy awards rendered against Iran by the Claims Tribunal. Ibid.

On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the agreement. Exec. Orders Nos. 12276-12285, 46 Fed. Reg. 7913-7932. These Orders revoked all licenses permitting the exercise of “any right, power, or privilege” with regard to Iranian funds, securities, or deposits; “nullified” all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them “to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.” Exec. Order No. 12279, 46 Fed. Reg. 7919.

On February 24, 1981, President Reagan issued an Executive Order in which he “ratified” the January 19th Executive Orders. Exec. Order No. 12294, 46 Fed. Reg. 14111. Moreover, he “suspended” all “claims which may be presented to the . . . Tribunal” and provided that such claims “shall have no legal effect in any action now pending in any court of the United States.” Ibid. The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due. Ibid.

The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide strike, recognized that “[t]he President's power, if any, to issue the order now pending in any court of the United States.” Ibid. The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due. Ibid.

Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown*, supra, at 597 (concurring opinion), that “[t]he great ordinances of the Constitution do not establish and divide fields of black and white.”
Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (dissenting opinion). Justice Jackson himself recognized that his three categories represented “a somewhat over-simplified grouping,” 343 U.S., at 635, and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

[Ed.: The Court first concluded that the International Emergency Economic Powers Act (IEEPA) constituted specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, but noted that there remained the question of the President's authority to suspend claims pending in American courts.]

Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294 the President purported to act under authority of both the IEEPA and 22 U.S.C. § 1732, the so-called “Hostage Act.” 46 Fed. Reg. 14111 (1981).

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, 651 F.2d, at 809-814; American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d, at 443, n.15; The Marschalk Co. v. Iran National Airlines Corp., 518 F.Supp. 69, 79 (SDNY 1981); Electronic Data Systems Corp. v. Social Security Organization of Iran, 508 F.Supp. 1350, 1361 (ND Tex. 1981).

The Hostage Act, passed in 1868, provides:

“Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.” Rev. Stat. § 2001, 22 U.S.C. § 1732.
We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. See, e.g., Cong. Globe, 40th Cong., 2d Sess., 4331 (1868) (Sen. Fessenden); id., at 4354 (Sen. Conness); see also 22 U.S.C. § 1731. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment “in violation of the rights of American citizenship.” Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship – they were seized precisely because of their American citizenship.

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. [T]he IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are “sources of friction” between the two sovereigns. United States v. Pink, 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another “are established international practice reflecting traditional international theory.” L. Henkin, Foreign Affairs and the Constitution 262 (1972). . . . [FN 8: . . . In fact, during the period of 1817-1917, “no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens.” W. McClure, International Executive Agreements 53 (1941).] Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the “United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.” Henkin, supra, at 262-263. Accord, Restatement (Second) of Foreign Relations Law of the United States § 213 (1965) (President “may waive or settle a claim against a foreign state . . . [even] without the consent of the [injured] national”). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China. [FN 9: Those agreements are [1979] 30 U.S.T. 1957 (People's Republic

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 64 Stat. 13, as amended, 22 U.S.C. § 1621 et seq. (1976 ed. and Supp. IV). The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. 22 U.S.C. § 1623(a). By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future. H.R.Rep. No. 770, 81st Cong., 1st Sess., 4, 8 (1949).


In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into Executive agreements without obtaining the advice and consent of the Senate. In United States v. Pink, 315 U.S. 203 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States’ relations with a foreign state: “Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the

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President. . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities ... is to be drastically revised.” Id., at 229-230.

Petitioner raises two arguments in opposition to the proposition that Congress has acquiesced in this longstanding practice of claims settlement by executive agreement. First, it suggests that all pre-1952 settlement claims, and corresponding court cases such as Pink, should be discounted because of the evolution of the doctrine of sovereign immunity. Petitioner observes that prior to 1952 the United States adhered to the doctrine of absolute sovereign immunity, so that absent action by the Executive there simply would be no remedy for a United States national against a foreign government. When the United States in 1952 adopted a more restrictive notion of sovereign immunity, by means of the so-called “Tate” letter, it is petitioner's view that United States nationals no longer needed executive aid to settle claims and that, as a result, the President's authority to settle such claims in some sense “disappeared.” Though petitioner's argument is not wholly without merit, it is refuted by the fact that since 1952 there have been at least 10 claims settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here.

In light of all of the foregoing – the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement – we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in Youngstown, 343 U.S., at 610-611, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.” Past practice does not, by itself, create power, but “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent. . . .” United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). See Haig v. Agee, 453 U.S., at 291, 292. Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

In Zivotofsky ex rel. Zivotofsky v. Secretary of State, 135 S. Ct. 2076, 2083-96 (2015), the Court considered the constitutionality of a congressional statute which provides that Americans born in Jerusalem may elect to have “Israel” listed as their place of birth on their passports, which the State Department declined to follow, citing its long-standing policy of not taking a position on the political status of Jerusalem. Although acknowledging the President and State Department’s acts were inconsistent with congressional policy, the Court held that the President’s power to decide whether and on what terms to recognize foreign governments was “exclusive” and “conclusive” on the matter, based on text, long-standing practice of congressional acquiescence, Court precedents, and functional considerations of the need for nation to “speak with one voice.” Three Justices dissented from this conclusion. Id. at 2116-17 (Scalia, J., joined by Roberts, C.J., and Alito, J., dissenting) (Act proper exercise of Congress’ power over Naturalization, which “enables Congress
to furnish the people it makes citizens with papers verifying their citizenship”); id. at 2113 (Roberts, C.J., joined by Alito, J., dissenting) (“Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”). See also id. at 2096-97 (Thomas, J., concurring in part and dissenting in part) (President has exclusive power over passports, which is part of President’s power to recognize foreign governments, but not over consular reports used for naturalization status, which is Congress’ power over Naturalization).

§ 11.3 The Treaty Power

1. Introduction to the Treaty Power

Under Article II, § 2, cl. 2, the President has the power, with the approval of 2/3 of the Senate present in favor, to make treaties. Regarding the President’s power unilaterally to terminate a treaty, scholars have disagreed. The Restatement (Third) of Foreign Relations Law of the United States maintains that the President of the United States has the power, among other things, "[T]o suspend or terminate an agreement in accordance with its terms." 8 In contrast, in 1979, Senator Goldwater's attorney in Goldwater v. Carter noted that "of 55 treaties terminated by the United States, 52 were broken with congressional approval." 9 Reflecting the pro-Presidential power approach, on December 13, 2001, the United States Ambassador to Moscow delivered a message to Russia that President Bush was giving 6 months notice of United States termination of the Anti-Ballistic Missile (ABM) Treaty, invoking Article XV of that document. The notice of termination came without the consent or concurrence of either house of Congress. 10

Under the Supremacy Clause of Article VI, § 2, treaties are part of the “supreme Law of the Land.” Thus, there is no 10th Amendment states’ rights limit on the treaty power. 11 The Court has stated, “If state action could defeat or alter our foreign policy, serious consequences might ensue.” 12 States have no right to enter into any “Treaty, Alliance, or Confederation” pursuant to Article I, § 10, cl. 1. State laws that conflict with federal foreign policy, including state laws that burden foreign


10 Id. at 226.

11 Missouri v. Holland, 252 U.S. 416, 432-35 (1920). See also Hauenstein v. Lynham, 100 U.S. 483 (1880) (a state cannot prevent aliens from inheriting land if a treaty protects that right).

commerce, such as barring state or local governments’ procurement of goods or services from persons doing business with pariah governments, are typically viewed as preempted by Congress, discussed at § 13.2.2 nn.23-24, or trigger a dormant commerce clause analysis, including the market participant exception, noted at § 13.4.2 n.66. Under Article I, § 10, cl. 2, no state, without Congress' consent, may lay any impost or duty on imports or exports, except what may be absolutely necessary for executing inspection laws. An executive agreement between the President and a foreign power also supersedes conflicting state policy.

2. Self-Executing versus Non-Self-Executing Treaties

In Medellin v. Texas, the Court held 6-3 that a treaty which comprises an international commitment is not domestic law enforceable by American courts unless Congress has: (1) enacted implementing statutes; or (2) the treaty itself conveys an intention that it is “self-executing” and is ratified on those terms. Justice Breyer’s dissent, joined by Justices Souter and Ginsburg, disagreed with the majority on how to determine whether a treaty is self-executing, the majority placing greater reliance on text.

Medellin v. Texas
552 U.S. 491 (2008)

Chief Justice ROBERTS delivered the opinion of the Court.

The International Court of Justice (ICJ), located in the Hague, is a tribunal established pursuant to the United Nations Charter to adjudicate disputes between member states. In the Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) (Avena), that tribunal considered a claim brought by Mexico against the United States. The ICJ held that, based on violations of the Vienna Convention, 51 named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. This was so regardless of any forfeiture of the right to raise Vienna Convention claims because of a failure to comply with generally applicable state rules governing challenges to criminal convictions.

In Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) – issued after Avena but involving individuals who were not named in the Avena judgment – we held that, contrary to the ICJ's determination, the Vienna Convention did not preclude the application of state default rules. After the Avena decision, President George W. Bush determined, through a Memorandum to the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. 187a (Memorandum or President's Memorandum), that the United States would “discharge its international obligations” under Avena “by having State courts give effect to the decision.”

13 552 U.S. 491, 497-98 (2008). Justice Stevens concurred in the judgment, but did not join Roberts’ majority opinion. He viewed that opinion as potentially creating a presumption of treaties being non-self-executing, a presumption that he did not share. Id. at 533-36 (Stevens, J., concurring in the judgment); id. at 547-51 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).
Petitioner José Ernesto Medellín, who had been convicted and sentenced in Texas state court for murder, is one of the 51 Mexican nationals named in the *Avena* decision. Relying on the ICJ's decision and the President's Memorandum, Medellín filed an application for a writ of habeas corpus in state court. The Texas Court of Criminal Appeals dismissed Medellin's application as an abuse of the writ under state law, given Medellin's failure to raise his Vienna Convention claim in a timely manner under state law. . . . We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empt state limitations on the filing of successive habeas petitions.

Medellín first contends that the ICJ's judgment in *Avena* constitutes a “binding” obligation on the state and federal courts of the United States. He argues that “by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are already the ‘Law of the Land’ by which all state and federal courts in this country are ‘bound.’” Reply Brief for Petitioner 1. Accordingly, Medellín argues, *Avena* is a binding federal rule of decision that pre-empt contrary state limitations on successive habeas petitions.

No one disputes that the *Avena* decision – a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes – constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts.

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson*, [27 U.S. (2 Pet.)] 253, 315 (1829), overruled on other grounds, *United States v. Percheman*, [32 U.S. (7 Pet.)] 51 (1833), which held that a treaty is “equivalent to an act of the legislature,” and hence self-executing, when it “operates of itself without the aid of any legislative provision.” Foster, supra, at 314. When, in contrast, “[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.” Whitney v. Robertson, 124 U.S. 190, 194 (1888). In sum, while 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.” Igartua–De La Rosa v. United States, 417 F.3d 145, 150 (C.A.1 2005) (en banc) (Boudin, C. J.).

As a signatory to the Optional Protocol, the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ. The Protocol provides: “Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice.” Art. I, 21 U.S.T., at 326. Of course, submitting to jurisdiction and agreeing to be bound are two different things. A party could, for example, agree to compulsory nonbinding arbitration. Such an agreement would require the party to appear before the arbitral tribunal without obligating the party to treat the tribunal's decision as binding. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Art.2018(1), Dec. 17, 1992, 32 I.L.M. 605, 697 (1993) (“On receipt of the final report of [the arbitral panel requested by a Party to the agreement], the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel”).

The most natural reading of the Optional Protocol is as a bare grant of jurisdiction. It provides only that “[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice” and “may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol.” Art. I, 21 U.S.T., at 326. The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment.

If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Mexico or the ICJ would have no need to proceed to the Security Council to enforce the judgment in this case. Noncompliance with an ICJ judgment through exercise of the Security Council veto – always regarded as an option by the Executive and ratifying Senate during and after consideration of the U.N. Charter, Optional Protocol, and ICJ Statute – would no longer be a viable alternative. There would be nothing to veto. In light of the U.N. Charter's remedial scheme, there is no reason to believe that the President and Senate signed up for such a result.

In sum, Medellín's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment – again, always regarded as an option by the political branches – any more than courts may consider whether to comply with any other species of domestic law. This result would be particularly anomalous in light of the principle that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – ‘the political’ – Departments.” Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

It is, moreover, well settled that the United States' interpretation of a treaty “is entitled to great weight.” Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-185 (1982); see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999). The Executive Branch has
unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law. See Brief for United States as Amicus Curiae 4, 27-29.

Our conclusion that Avena does not by itself constitute binding federal law is confirmed by the “postratification understanding” of signatory nations. See Zicherman, 516 U.S., at 226. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellín nor his amici have identified a single nation that treats ICJ judgments as binding in domestic courts.

[W]e reiterated in Sanchez-Llamas what we held in Breard, that “‘absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.’” 548 U.S., at 351 (quoting Breard, 523 U.S., at 375). Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement in the Optional Protocol, the U.N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.

Justice STEVENS, concurring in the judgment.

There is a great deal of wisdom in Justice Breyer's dissent. I agree that the text and history of the Supremacy Clause, as well as this Court's treaty-related cases, do not support a presumption against self-execution. I also endorse the proposition that the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820, “is itself self-executing and judicially enforceable.” Moreover, I think this case presents a closer question than the Court's opinion allows. In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice (ICJ) in Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) (Avena).

The source of the United States' obligation to comply with judgments of the ICJ is found in Article 94(1) of the United Nations Charter, which was ratified in 1945. Article 94(1) provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.” 59 Stat. 1051, T.S. No. 993 (emphasis added). In my view, the words “undertakes to comply” – while not the model of either a self-executing or a non-self-executing commitment – are most naturally read as a promise to take additional steps to enforce ICJ judgments.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

The Constitution's Supremacy Clause provides that “all Treaties ... 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.” Art. VI, cl. 2. The Clause means that the “courts” must regard “a treaty ... as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.” Foster v. Neilson 2 Pet. 253, 314 (1829) (majority opinion of Marshall, C. J.).
Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that “all Treaties . . . shall be the supreme Law of the Land.” Art. VI, cl. 2. In 1796, for example, the Court decided the case of *Ware v. Hylton*, [3 U.S. (3 Dall.) 199 (1976)]. A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that required debtors to repay money owed to British creditors into a Virginia state fund. Id., at 220-221 (opinion of Chase, J.). The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that “‘the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts, theretofore contracted’”; and that provision, the creditor argued, effectively nullified the state law. Id., at 203-204 (Reporter's Summary). The Court, with each Justice writing separately, agreed with the British creditor, held the Virginia statute invalid. Id., at 285.

Justice Iredell pointed out that some Treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were “executed,” taking effect automatically upon ratification. 3 Dall., at 272. Other provisions were “executory,” in the sense that they were “to be carried into execution” by each signatory nation “in the manner which the Constitution of that nation prescribes.” Ibid. Before adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law only if Congress on the American side, or Parliament on the British side, had written them into domestic law. Id., at 274-277.

But, Justice Iredell adds, after the Constitution's adoption, while further parliamentary action remained necessary in Britain (where the “practice” of the need for an “act of parliament” in respect to “any thing of a legislative nature” had “been constantly observed,” id., at 275-276), . . . legislative action in respect to the treaty's debt-collection provision was no longer necessary in the United States. Id., at 276-277. The ratification of the Constitution with its Supremacy Clause means that treaty provisions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well. Id., at 277.

Some 30 years later, the Court returned to the “self-execution” problem. In *Foster*, [27 U.S. (2 Pet.) 253 (1829)], the Court examined a provision in an 1819 treaty with Spain ceding Florida to the United States; the provision said that “'grants of land made’” by Spain before January 24, 1818, “'shall be ratified and confirmed’” to the grantee. Id., at 310. Chief Justice Marshall, writing for the Court, noted that, as a general matter, one might expect a signatory nation to execute a treaty through a formal exercise of its domestic sovereign authority (e.g., through an act of the legislature). Id., at 314. But in the United States “a different principle” applies. Ibid. (emphasis added). The Supremacy Clause means that, here, a treaty is “the law of the land . . . to be regarded in Courts of justice as equivalent to an act of the legislature” and “operates of itself without the aid of any legislative provision” unless it specifically contemplates execution by the legislature and thereby “addresses itself to the political, not the judicial department.” Ibid. (emphasis added). The Court decided that the treaty provision in question was not self-executing; in its view, the words “shall be ratified” demonstrated that the provision foresaw further legislative action. Id., at 315.
The Court, however, changed its mind about the result in Foster four years later, after being shown a less legislatively oriented, less tentative, but equally authentic Spanish-language version of the treaty. See United States v. Percheman, [32 U.S. (7 Pet.)] 51, 88-89 (1833). And by 1840, instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that “it would be a bold proposition” to assert “that an act of Congress must be first passed” in order to give a treaty effect as “a supreme law of the land.” Lessee of Pollard's Heirs v. Kibbe, 14 Pet. 353, 388 (1840) (Baldwin, J., concurring).

Since Foster and Pollard, this Court has frequently held or assumed that particular treaty provisions are self-executing, automatically binding the States without more. See Appendix A, infra (listing, as examples, 29 such cases, including 12 concluding that the treaty provision invalidates state or territorial law or policy as a consequence). See also Wu, Treaties' Domains, 93 Va. L. Rev. 571, 583-584 (2007) (concluding “enforcement against States is the primary and historically most significant type of treaty enforcement in the United States”).

The case law provides no simple magic answer to the question whether a particular treaty provision is self-executing. But the case law does make clear that, insofar as today's majority looks for language about “self-execution” in the treaty itself and insofar as it erects “clear statement” presumptions designed to help find an answer, it is misguided. See, e.g., ante, at 1363-1364 (expecting “clea[r] state[ment]” of parties' intent where treaty obligation “may interfere with state procedural rules”); ante, at 1368 (for treaty to be self-executing, Executive should at drafting “ensur[e] that it contains language plainly providing for domestic enforceability”).

The many treaty provisions that this Court has found self-executing contain no textual language on the point (see Appendix A, infra ). Few, if any, of these provisions are clear. See, e.g., Ware, [3 U.S. (3 Dall.)], at 273 (opinion of Iredell, J.). Those that displace state law in respect to such quintessential state matters as, say, property, inheritance, or debt repayment, lack the “clea[r] state[ment]” that the Court today apparently requires. This is also true of those cases that deal with state rules roughly comparable to the sort that the majority suggests require special accommodation. See, e.g., Hopkirk v. Bell, 3 Cranch 454, 457-458 (1806) (treaty pre-empts Virginia state statute of limitations). These many Supreme Court cases finding treaty provisions to be self-executing cannot be reconciled with the majority's demand for textual clarity.

[Ed.: Applying a balancing approach based on weighing a number of factors, Justice Breyer then considered seven reasons which, taken together, gave the ICJ judgment domestic effect. These seven reasons were: while the language of the treaty does not explicitly say it is self-executing, it does suggest the treaty should be “as binding” as possible; the underlying dispute involves the meaning of a Vienna Convention provision that itself is “self-executing”; the objective of the ICJ Protocol was to provide a forum for compulsory settlement; imposing the majority’s clear statement rule has “negative practical implications” because it might effect the enforceability of many other similarly drafted treatises; this case concerns the kind of matter with which judges are familiar; the Court will not need to create a new cause of action; and neither the President nor Congress had expressed concern about judicial enforcement of the ICJ decision.]
Given that a judgment by the International Court of Justice was not self-executing, the Court then rejected a contention that an ICJ judgment had become domestic law binding on state and federal courts as the result of a Presidential Memorandum. For himself and Justices Scalia, Kennedy, Thomas, and Alito, Chief Justice Roberts wrote that the executive cannot unilaterally execute a non-self-enforcing treaty by giving it domestic effect. The Court distinguished cases based on Justice Frankfurter’s famous passage that “a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned” may create a “gloss” on executive power under Article II. Here, there was not a single prior instance of acquiescence in a Presidential directive issued to state courts. Also rejected was an argument that the President’s Memorandum was an exercise of authority to resolve foreign claims pursuant to an executive agreement. The Court said that the claims settlement cases involved a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nations. Following this case, Texas moved forward applying the death penalty to inmates who were Mexican nationals, despite the Mexican consulate not having been informed of their detention initially, as the ICJ judgment said was required under international law. Jose Medellin, the inmate involved in Medellin v. Texas, was executed on August 5, 2008. The Court allowed another prisoner in similar circumstances to be executed on July 7, 2011.

3. Constitutional Limits on the Treaty Power

The Court has made it clear that treaties or executive agreements, or laws enacted pursuant to treaties or executive agreements, will not be enforced in American domestic courts if they violate constitutional prohibitions. This is based on the Constitution being “the supreme Law of the Land,” and the view that the President and Congress have no authority to negotiate and ratify any treaty provision or executive agreement that is in conflict with the Constitution, such as providing for trial of civilian military dependents by court-martial in violation of the jury trial provisions of the Fifth and Sixth Amendments, as held in Reid v. Covert. As with other government powers, the treaty power is subject to Bill of Rights prohibitions, subject to a limited exception, recognized at the turn of the 20th century, initially in a 5-4 opinion, in the so-called The Insular Cases, for United States action involving “non-fundamental” constitutional rights over “recently” acquired territories, including the Philippines, Hawaii, and Puerto Rico, with “entirely different cultures and traditions”

14 552 U.S. at 528-32. Justice Stevens agreed that unilateral Presidential action could not make a non-self-executing treaty binding law in American courts. Id. at 536 (Stevens, J., concurring in the judgment). Three Justices did not address the issue because they concluded that the treaty was self-executing. Id. at 566 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).


from the United States. 17 While this exception was of greater importance during the formalist and Holmesian eras, when fewer Bill of Rights provisions were viewed as “fundamental,” discussed at § 14.3.1(B) & 14.3.1(C), this exception has limited impact today given the fact that most Bill of Rights provisions became viewed as “fundamental” during the instrumentalist era, discussed at § 14.3.1(D), and remain “fundamental” today, addressed at § 14.3.2.

Additionally, treaty or executive agreement obligations may be superseded by later federal legislation. Under well-established doctrine, treaties and executive agreements, like statutes, stand on the same constitutional footing, and in case of a conflict, whichever was passed last controls. 18 In determining whether a conflict exists, the Court has stated that “an act of Congress ought never to be construed to violate the law of nations if any other construction remains.” 19 In addition, there is a maxim of construction that “courts should interpret treaties liberally and in good faith so as to preserve amity among nations.” 20

Despite this doctrine applicable to United States domestic courts, for purposes of international law, such as decisions by the International Court of Justice at the Hague in the Netherlands, valid treaty obligations are superior to the domestic constitutional law of any nation. 21 Thus, there is a possibility of conflicting rulings if a treaty provision enacted by the United States is viewed as violating the United States Constitution. In such a case, United States domestic courts will base

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18 See Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 599-603 (1889). For an article adopting the novel view that treaty provisions should trump even later-passed statutes, departing from the normal, well-established rule that whichever one is passed last controls, see Scott A. Penner, Note, Changing the Balance of Power: Why a Treaty-Trump Presumption Should Replace the Later-in-Time Rule When Interpreting Conflicting Treaties and Statutes, 34 Hastings Const. L.Q. 355 (2007). While not likely to be adopted in practice, the article is useful in challenging the premises of the current well-established rule on the topic.


their decision on the Constitution. The international court will base its decision on the treaty, although in interpreting the treaty international courts would take into account constitutional requirements in deciding what the United States government actually adopted in ratifying the treaty. Depending on what enforcement mechanisms are present, and few direct enforcement mechanisms exist at international law, the United States government would have to decide how to proceed if met with conflicting rulings from the different tribunals. It might be good in theory to follow international law, but domestic political pressures might counsel a different practice.

4. Use of the Treaty Power to Expand Federal Domestic Power

To implement a treaty or executive agreement, the question has arisen whether Congress may pass a law it could not enact in the absence of the treaty or agreement. In Missouri v. Holland, the Court appeared to say "yes," at least if the treaty does not violate any constitutional prohibition and is a good faith attempt to address a national problem with which the states cannot effectively cope.

Missouri v. Holland
252 U.S. 416 (1920)

Justice HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority


invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. Kansas v. Colorado, 185 U.S. 125, 142. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237. A motion to dismiss was sustained by the District Court on the ground that the [Act] is constitutional. 258 Fed. Rep. 479. Acc. United States v. Thompson, 258 Fed. Rep. 257; United States v. Rockefeller, 260 Fed. Rep. 346.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. 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. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. United States v. Shauver, 214 Fed. Rep. 154. United States v. McCullagh, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U.S. 519, this control was one that Congress had no power to displace.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress 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. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious 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. Andrews v. Andrews, 188 U.S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. 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. We must consider what this country has become in deciding what that Amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." Baldwin v. Franks, 120 U.S. 678, 683. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitution law for this proposition; it was recognized as early as Hopkirk v. Bell, 3 Cranch, 454 [(1806)], with regard to statutes of limitation, and even earlier, as to confiscation, in Ware v. Hylton, 3 Dall. 199 [(1796)]. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in Chirac v. Chirac, 2 Wheat. 259, 275 [(1817)]. So as to a limited jurisdiction of foreign consuls within a State. Wildenhus's Case, 120 U.S. 1 [(1887)].
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. [Ed.: For example, Passenger Pigeons, once numbering in the billions in the United States, were rendered extinct between 1870-1914, due to habitat destruction and commercial hunting for a cheap source of food, accentuated by a “fad” for “squab” (pigeon meat) at the end of the 19th century.] 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. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Carey v. South Dakota, 250 U.S. 118.

Justice VAN DEVANTER and Justice PITNEY dissent. [Ed.: No dissenting opinion filed.]

In Bond v. United States, 134 S. Ct. 2077, 2083 (2014), the Court dodged the issue of a whether a treaty could ever augment congressional enforcement power by ruling that the Chemical Weapons Convention Implementation Act of 1998 did not reach an attempt by a wife to injure her husband’s lover with a chemical compound that gave her “a minor thumb burn.” A three-Justice concurrence concluded the statute applied, but was unconstitutional as outside Congress’ domestic power, and not justified as part of treaty enforcement, which is limited to international matters. Id. at 2102 (Thomas, J., joined by Scalia, J., & Alito, J., as to Parts I, II and III, concurring in the judgment).

§ 11.4 Power to Make Executive Agreements and Additional Considerations

As discussed in Dames & Moore v. Regan, excerpted at § 11.2, the President has the power to enter into executive agreements with the Chief Executives of foreign nations. These agreements bind the United States just as would a treaty, as discussed at § 11.3.3 nn.18-20. It has been noted:

There has been congressional-executive agreements since early in U.S. history. In 1792, Congress authorized the Postmaster General to conclude international agreements concerning the exchange of mail. Congressional-executive agreements have been especially common in the area of international trade, in part because of the perception that this area falls within the prerogatives of the full Congress to regulate foreign commerce and raise revenues.

The number of congressional-executive agreements rose dramatically in the twentieth century. The establishment of the United Nations at the end of World War II prompted a substantial growth in international agreements, and the increased global role of the United States during and after the war prompted greater U.S. involvement in such agreements.26

While in theory the ability of Presidents to sign executive agreements without the 2/3 approval of the Senate may appear to give the President a large measure of sovereign authority, in practice many separation of powers concerns are mitigated by viewing the executive agreements as non-self-executing, and thus enforceable only if Congress supports the agreement by passing enabling legislation. Particularly in the area of international trade, such as many trade agreements, like NAFTA (North American Free Trade Agreement) and GATT (General Agreement on Tariffs and Trade), Congress gives the President the ability to negotiate based on “fast track” approval, which requires Congress to vote up-or-down on any proposed agreement without amendment. Such “fast track” approval makes it possible for the President to negotiate such trade agreements knowing that further negotiations will not have to take place based on any congressional amendments to the initial agreement. At the end of the day, however, Congress must approve the proposed executive agreement and pass implementing legislation or else the agreement will have no domestic effect.27

During the first part of the 19th century, the Marshall Court adopted the traditional view that Native American tribes were “domestic, dependent nations.”28 Rights “reserved” to the tribes were thus the subject of treaty negotiations, the tribes being “sovereign nations” for this purpose.29 In 1871, Congress altered this understanding by stating that treaties would no longer be used to regulate Native American tribes, but that regulation would be done pursuant to congressional statutes and executive implementation. This was done to ensure that the House of Representatives would have an equal say in making policy regarding Native Americans and management of federal lands, rather than policy made by the President and 2/3 of the Senate under the treaty power.30

Some commentators have questioned whether some delegations of sovereign power to international tribunals, such as the United Nations, the Organization for Economic Cooperation and Development, the International Labour Organization, or the World Trade Organization violate implied structural principles in the Constitution regarding federal sovereignty.31 The Supreme Court has never indicated any interest in developing doctrine along those lines.


Cases involving international relations, not governed directly by the federal Constitution, statutes, treaties, or executive agreements, are an area of federal common law. This notion of federal common law also applies to cases involving the propriety rights of Native Americans, and the role of the federal judiciary in determining the proper extent of jurisdiction of state courts over aliens. It has been noted:

Under Chief Justices Jay and Marshall, the Court heard more than 1300 cases between 1791 and 1835. . . . 323 of these cases, or one in four, involved the foreign affairs of the United States. Nearly two in five cases heard by the Jay Court involved international issues. During John Marshall's thirty-five-year term as Chief Justice, only one year, 1803, failed to see a single foreign relations case reach the Supreme Court.

More than half of all foreign affairs cases involved a foreign party or transaction. . . . A larger number involved foreign or international laws, though international laws outnumbered foreign ones almost five to one. Cases involving the extraterritorial application of U.S. law reached the Supreme Court 110 times. The vast majority of these cases involved nonintercourse or embargo acts or the prohibition against slave trading.

In addition, Article I, § 8, cl. 10 grants to Congress the power, among other things, "[t]o define and punish . . . Offenses against the Law of Nations . . . ." This clause grants Congress power to incorporate international law into federal law, even when such norms infringe upon areas otherwise regulated by the states. Further, as the Court noted in Sosa v. Alvarez-Machain, where Congress has passed a jurisdictional statute, such as the Alien Tort Claims Act, which creates on its own no new causes of action, the reasonable inference is that the statute was intended to have practical effect the moment it became law and federal common law would provide some causes of action for international law violations with a potential for personal liability.

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CHAPTER 12: MILITARY MATTERS

§ 12.1 Text of the Constitution and Cases Before 1937 Regarding Military Matters

1. Text of the Constitution

Under Article I, § 8, cl. 11, Congress has the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” While the matter is not without dispute, it has been argued that the best understanding of the historical evidence suggests that military theory at the time of the Framing focused “on the theories of both declared and undeclared wars, with a declaration being regarded as necessary to commence an offensive war, but none being necessary for a purely defensive war. Further, military theory of the time had also developed the concept of ‘perfect’ and ‘imperfect’ war. A ‘perfect’ war was one which was complete, while an ‘imperfect’ war was more limited, and accomplished through use of ‘reprisals.’” On this understanding, Congress is granted the power to initiate both major and minor military actions, not the President, because Congress is granted both powers over “war” and “reprisal.”

This view of the balance of power between Congress and the President is supported by reading the congressional power to grant “letters of marque and reprisal” in Article I, § 8, cl. 11 as including the power to authorize the President to undertake “reprisals” as a form of minor military action. This is the traditional view of congressional power in this area, and is consistent with 18th-century political doctrine. For example, as phrased by 18th century natural law writer Burlamanqui, “By reprisals then we mean that imperfect kind of war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice.”

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1 Jeffrey D. Jackson, The Dog of War as a Puppy: The Constitutional Power to Initiate Hostilities as Answered by the Framing, 1 Geo. J.L. & Pub. Ply. 361, 369 (2003) (discussing the views of 17th and 18th century natural law philosophers, such as Hugo Grotius, Samuel Pufendorf, and Emmerich de Vattel, on the subject of war).

2 On this view, see generally Charles A. Lofgren, War-Making Under the Constitution: The Original Understanding, 81 Yale L.J. 672, 689-702 (1972) (citing Burlamanqui, at 692 n.90).
On the other hand, literally the power of “letters of marque and reprisal” involved the sovereign directing private parties, so-called “privateers,” to seize or destroy property or persons in the name of the sovereign. Famous English examples of that power included Sir Francis Drake being given that power regarding Spanish galleons. While that practice had diminish during the 18th century, and colloquially “reprisal” had come to have the broader meaning of limited offensive military action, it is possible to read the congressional grant of power over “letters of marque and reprisal” as limited to its core literal meaning of direction to private parties. So read, that would leave a gap between Congress’ power to initiate major military action through declaring “war,” and authorizing private “reprisals.” That gap would be filled by the President’s Commander-in-Chief power to initiate minor military action without congressional authorization.3

This result would be consistent with a conservative predisposition to favor executive power, noted at § 9.1.1 n.14. However, a fuller analysis would have to explain why the Constitution is properly read to create this gap in power, and then filled by unilateral Presidential action, without any specific textual language supporting that reading. Under a core literal meaning approach, the term “Commander in Chief” is a power to command when called into service by Congress, not a power to initiate military action. Regarding the term “letters of marque and reprisal,” during the 19th century the 1856 Declaration of Paris banned letters of marque, defined as directed to private parties. Although the United States did not sign that treaty, the United States has abided by its terms.

Under Article I, § 8, cl. 12-16, Congress also has the powers: “To raise and support Armies, but no Appropriation of Money to that Use shall be for a term longer 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 [today termed the state National Guards] to execute the Laws of the Union, suppress Insurrections and repel Invasions”; and “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.” As a matter of purposive interpretation, and legislative practice, the provisions regarding the army and navy also give Congress the power to provide for and maintain an air force and the marines. Under the Necessary and Proper Clause, Congress also has the power to make all laws which shall be necessary and proper for carrying into execution these powers.

Under Article II, § 1 of the Constitution, the President has “the executive Power.” This includes, as listed in Article II, § 3, the duty to “take Care that the Laws be faithfully executed.” Under Article II, § 2, cl. 1, the President is the “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.” Under Article II, § 2, cl. 2, the President has the “Power by and with the Advice and Consent of the Senate to make Treatises, provided two thirds of the Senators present concur.”

The Constitution makes the war power almost exclusively federal. Under Article I, § 10, cls. 1 & 3, states cannot grant letters of marque and reprisal, cannot keep troops or ships of war in time of peace, unless Congress consents; and cannot “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” This language also suggests a distinction between offensive military action, to which consent by Congress is needed, and the right, even absent a declaration, to undertake defensive military action in emergency circumstances.

World War II restrictions on persons of Japanese ancestry were sustained under the war powers of Congress and the President, including a curfew for American citizens of Japanese descent, and later forced internment. The Court said that the war power is all power needed to wage war successfully. It includes steps to prevent espionage and sabotage and all other matters so related to war as substantially to affect its conduct and progress. War powers do not end with the end of hostilities. Congress may deal with continuing evils arising from a war, such as a federal rent control law upheld in 1948 because World War II, though ending in 1945, had contributed to a housing deficit.

As with other government powers, the war power is subject to Bill of Rights prohibitions, subject to a limited early 20th century exception, discussed at § 11.3.3 n.17, in The Insular Cases, for United States action involving “non-fundamental” constitutional rights over “recently” acquired territories, including the Philippines, Hawaii, and Puerto Rico, with “entirely different cultures and traditions” from the United States.

2. Cases Before 1937 Regarding Military Matters

There has always been a debate over how much power the President has as Commander-in-Chief to order military personnel into action without first seeking a congressional declaration of war or other means of congressional support. A classic example of this issue arising in the Supreme Court occurred in 1862 in The Prize Cases, excerpted below. Even though the 5-4 Court approved President Lincoln’s use of military force against rebels he considered to be belligerents after Fort Sumter was fired upon on April 12, 1861, it was unclear whether the power to act rested entirely on presidential power as Commander in Chief or whether it was authorized under Acts of Congress passed in 1795 and 1807. The point was not critical for the outcome, as the Court said that even if the President’s actions needed further congressional approval, it had been given by ratification on July 13, 1861. Four Justices in dissent said that only Congress could declare war, and that the congressional ratification was invalid as applied to acts before July 13, 1861.

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It has been noted that Congress’ power for “calling forth” the state Militias, and providing for their “organizing, arming, and disciplining,” as well as “governing such Part of them as may be employed in the Service of the United States” suggests the framers and ratifiers believed in a limited view of the President’s Commander-in-Chief power to authorize military action on his own, since if the President was not given the power to order the state Militias into action, it is even less likely the President would have been given the greater power to order the United States military into action.7

The Prize Cases
67 U.S. (2 Black) 635 (1863)

Justice GRIER delivered the opinion of the court.

There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

Neutrals have a right to challenge the existence of a blockade de facto, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade de facto actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "jus belli," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: “When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.”

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is 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 has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to [call] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

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 on 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 13th, 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.

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 that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "ex major cautela" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "omnis ratification retrotrahitur et mandato equiparatur," this ratification has operated to perfectly cure the defect. In the case of Brown vs. United States, (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is **ex post facto**, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, **jure belli**, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been stated apply alike to all of them.

I. The case of the brig Amy Warwick.

This vessel was captured upon the high seas by the United States gunboat Quaker City, and with her cargo was sent into the district of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund
Davenport & Co., and four thousand seven hundred bags by Dunlap Moncure & Co. The title of these parties as respectively claimed was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as "enemies' property."

The claim of Phipps & Co. for their advance was allowed by the Court below. That part of the decree was not appealed from and is not before us. The case presents no question but that of enemies' property.

The decree below is affirmed with costs.

Justice NELSON, dissenting. Chief Justice TANEY, Justice CATRON and Justice CLIFFORD, concurred in the dissenting opinion of Justice NELSON.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or inter gents, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he had committed some offence against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

Congress on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an ex post facto civil war with all the rights of capture and confiscation, jure belli, from the date referred to. An ex post facto law is defined, when, after an action, indifferent in itself, or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words trade and commerce authorized at the time by acts of Congress and treaties, may, by ex post facto legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the Government, the seizure being a partial exercise of that power, and which was soon after exercised in full.
The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Element of Int. Law, pt. 4, ch. 1. sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any Constitutional authority, and void; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

The Supreme Court’s opinion in the Prize Cases can be read as limited to holding that President Lincoln was authorized by 1795 and 1807 legislation to declare a blockade in the event of an insurrection or that, in any event, Congress could and did ratify the President's action by later legislation in 1861. Some of the reasoning of the majority opinion, however, can be interpreted to say that even without congressional approval the President has power to resist armed force with force, and that whether armed resistance calls for others to be treated as belligerents is a question to be decided by the President.

§ 12.2 Starting Military Matters in the Modern Post-1937 Era

In our Nation’s history, Presidents have called troops into action over 200 times, both for large-scale actions, such as in Korea in the 1950s and Vietnam in the 1960s and 1970s, or smaller-scale actions, such as invading Grenada in the 1980s. Congress has formally declared war only five times: the War of 1812, the Mexican-American War in 1846, the Spanish-American War in 1898, World War I in 1917, and World War II in 1941. Other military actions have been based on more limited congressional authorization. For example, for the Vietnam War, one can cite the 1954 Southeast Asia Collective Defense Treaty (SEATO), that treaty earlier ratified by the Senate; the Gulf of Tonkin Resolution, passed by Congress in 1964, which provided authority for military personnel to defend themselves against attack in the Vietnam theater of operations; and implied congressional

authorization through Congress continuing to fund Department of Defense requests for money to continue the military action.9

When it came to dealing with the Vietnam hostilities, the Supreme Court manifested considerable reluctance to take a case in which the issue was whether, war not having been formally declared by Congress, the military action of the United States was "illegal."10 The Second Circuit Court of Appeals did decide in 1971 that Congress had sufficiently authorized the South-East Asian commitments of the United States, including the furnishing of manpower and materials of war for protracted military operations in Vietnam.11

In 1973, Congress passed the War Powers Act over the veto of President Nixon. Among other things, the law requires consultation between Congress and the President "in every possible instance" before introducing United States Armed Forces into situations where imminent involvement in hostilities is clearly indicated by the circumstances. That Act provides that the President may commit United States military personnel into circumstances of "imminent hostilities" for a brief period of time, but the Act also calls for a report within 48 hours on the introduction of armed forces in such a situation, and requires the termination of the use of such forces whenever Congress so directs by concurrent resolution (basically a two-house veto of the President’s action), or within 60 days unless Congress has declared war, or has extended by law such 60-day period, or is physically unable to meet as a result of an armed attack upon the United States. The President can trigger an additional 30-day grace period if “unavoidable military necessity respecting the safety” of the troops requires continued presence “in the course of bringing about a prompt removal of such forces.” The Act also provides that the President has authority to act in times of a “national emergency” created by a sudden attack on the United States, its territories and possessions, or its armed forces.12

There is continuing controversy over the constitutionality of the War Powers Act, often termed the War Powers Resolution. Each President since the Act was passed has maintained the Act is an unconstitutional infringement on the President’s constitutional power as Commander in Chief, although each President has attempted to comply with the Act’s provisions in practice. Congress has always taken the view that the Act is constitutional as part of Congress’ power in Article I, § 8, cl. 11 to declare war.


Based upon the Chadha case, excerpted at § 9.3, the two-house legislative veto contained within this law is almost certainly invalid. However, the broader question of whether the other provisions of the War Powers Resolution are constitutional is more questionable. That issue has not come before the Court. Presidents have tended to avoid a direct conflict with Congress by reporting various use of the armed forces, but saying that action was taken in accord with a desire to inform Congress and “consistent with the War Powers Resolution.” Congress has also authorized presidential action in circumstances which might otherwise trigger the Act. For example, over the last twenty years, the presence of American troops at various times in South Korea, Bosnia, Saudi Arabia, Kosovo, Afghanistan, and Iraq have been approved by Congress, so troop presence there, including any continued presence, does not raise serious constitutional questions.

Since 1973, the only technical failure to comply with the War Powers Act occurred in 1999, when President Clinton continued bombing Serbia for 19 days longer than the 60 days permitted by the Act, as part of a NATO-authorized response to Serbia’s pattern of ethnic cleansing in Kosovo. That continued bombing was not approved by the House of Representatives, based upon a 213-213 tie vote. When a member of the House brought suit against President Clinton challenging his actions, lower federal courts dismissed the complaint on grounds of standing, and the case was not appealed to the Supreme Court.13

A similar issue was raised in the Summer of 2011, when President Obama authorized United States participation, along with France and Great Britain, in support of the rebels fighting against the Khadafi regime in Libya. In that case, President Obama claimed that the War Powers Resolution was not triggered, since the United States role was merely to provide back-up for France and British bombing runs and other military action, and thus United States forces were not introduced in a position of imminent hostilities themselves. Although members of Congress complained about this justification at the time, and there is a legitimate issue whether imminent hostilities existed, no congressional lawsuit was filed. The issue became functionally moot with the fall of the Libyan regime and the end of on-going U.S. military support obligations by the end of 2011.14

Although the matter is not beyond dispute, probably the best analysis is that the major provisions of the War Powers Resolution are constitutional. In considering Congress’ power over military matters, the Framers’ first draft gave Congress the power to “make war.” At the suggestion of James Madison, this was amended to give Congress the power to “declare war” in order to make it clear that the President should have the power to repel sudden attacks, while Congress has the power to


“declare” war and reprisals, that is, to authorize major or minor offensive military action, as opposed to defensive military action. The shift in terminology also made it clear that the President had the Commander-in-Chief power to direct, or “make” war, while Congress had the power to trigger military action, that is, “declare” war. The War Powers Resolution provisions explicitly authorizing Presidential action to respond to sudden attacks is consistent with this understanding of congressional versus presidential constitutional powers.15

Where the President commits armed forces in an effort to rescue American hostages, the President can invoke the Hostage Act of 1868. Codified at 22 U.S.C. § 2272, it provides:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of the government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizens, the President shall forthwith demand the release of such citizens, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release, and all the facts and proceedings relating thereto shall as soon as practicable be communicated by the President to Congress.

The Act raises a number of unanswered questions. For example, in this context what are acts of war, as opposed to mere reprisals? How about President Carter’s attempt to rescue hostages in Iran? Was President Reagan’s invasion of Grenada, based on rescuing American citizens at a medical school there, an act of war? Probably both were limited military actions properly viewed as reprisals, not acts of war. A closer question, which became moot, was raised when there was the possibility during the Clinton Administration of an invasion of Haiti to restore democratic government, end human rights abuses, and protect American citizens.

§ 12.3 Managing Military Matters, Including Authorizing Military Tribunals

Even where the presence of troops in foreign countries does not raise serious constitutional concerns, collateral questions of executive power can arise from those occupations. One of the most serious of these concerns is the ability to create military commissions to oversee the occupation and prosecute various individuals held by military forces. In Ex parte Milligan, Ex parte Mitsuye Endo,

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and *Duncan v. Kahanamoku*,\(^\text{16}\) the Court "insisted that military power to detain civilians (or those who claimed to be civilians) within the United States must remain subordinate to the Article III courts and the safeguards of the Bill of Rights."\(^\text{17}\) In contrast, in a case involving enemy combatants, the Court held in *Ex parte Quirin*,\(^\text{18}\) excerpted below, that enemy combatants could constitutionally be tried in military courts. In *Johnson v. Eisentrager*,\(^\text{19}\) the Court denied foreign nationals, held outside the United States, the right to petition for habeas corpus in American federal courts.

In *Rasul v. Bush*,\(^\text{20}\) decided in 2004, the detainees were foreign nationals seized abroad and held outside United States borders. The petitioners were held at the United States Naval Base in Guantanamo Bay, Cuba, for a seemingly indefinite period. The Court framed the issue as “whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.” By a 6-3 vote, the Court held that the federal courts do have such jurisdiction.

For a 5-Justice majority opinion, Justice Stevens distinguished *Johnson v. Eisentrager* on the grounds that *Eisentrager* involved consideration of whether foreign nationals have a constitutional right of habeas corpus, absent a statutory grant of jurisdiction to the federal courts. Justice Stevens then noted, “Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager’s* resort to ‘fundamentals,’ persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review.” Justice Stevens continued:

> In *Braden v. 30th Judicial Circuit Court of Ky.*, this Court held . . . that the prisoner's presence within the territorial jurisdiction of the district court is not “an invariable prerequisite” to the exercise of district court jurisdiction under the federal habeas statute. Rather, because “the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” a district court acts “within [its] respective jurisdiction” within the meaning of [28 U.S.C.] § 2241 [the general habeas statute] as long as “the custodian can be reached by service of process.”\(^\text{21}\)

\(^{16}\) Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ex parte Mitsuye Endo, 323 U.S. 283 (1944); Duncan v. Kahanamoku, 327 U.S. 304 (1946).


\(^{18}\) 317 U.S. 1, 20-21 (1942).

\(^{19}\) 339 U.S. 763, 790-91 (1950).


\(^{21}\) *Id.* at 478-79, citing *Braden*, 410 U.S. 484, 494-95 (1973).
In dissent, Justice Scalia, joined by Chief Justice Rehnquist, and Justice Thomas, concluded that *Braden* did not clearly overrule *Eisentrager*. He said, “This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change § 2241, and dissent from the Court's unprecedented holding.”

Concurring in the judgment, Justice Kennedy agreed that it was not clear that *Braden* overruled *Eisentrager*. Nonetheless, he concluded that “the facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions.” Kennedy stated:

First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the “implied protection” of the United States to it. The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify “a limited opening of our courts” to show that they were “of friendly personal disposition” and not enemy aliens. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

Ex parte Quirin  
317 U.S. 1 (1942)

Chief Justice STONE delivered the opinion of the Court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

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22 *Id.* at 488-89 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

23 *Id.* at 487 (Kennedy, J., concurring in the judgment).
All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. See Perkins v. Elg, 307 U.S. 325, 334; United States ex rel. Rojak v. Marshall, D.C., 34 F.2d 219; United States ex rel. Scimeca v. Husband, 2 Cir., 6 F.2d 957, 958; 8 U.S.C. § 801, 8 U.S.C.A. § 801, and compare 8 U.S.C. § 808, 8 U.S.C.A. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The Constitution confers on the President the “executive Power,” Art II, § 1, cl. 1, and imposes on him the duty to “take Care that the Laws be faithfully executed.” Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.
The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U.S.C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the “military commission” appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that “the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals.” Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class “any other person who by the law of war is subject to trial by military tribunals” and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act “shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial.” 50 U.S.C. § 38.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus 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. And the President, as Commander in Chief, by his Proclamation in time of war his invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.
By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d Ed., pp. 1196-1197, 1219-1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V.

The Court’s opinion in *Ex parte Quirin* upheld the President’s use of military commissions for enemy combatants where Congress had authorized such tribunals. In contrast, in *Hamdan v. Rumsfeld,* decided in 2006, the Court decided that the initial set of procedures adopted by the Bush Administration to try detainees at Guantanamo Bay, like Hamdan, were not expressly authorized by any congressional act. Absent congressional authorization, the procedures were held to violate existing statutory and treaty requirements: the Uniform Code of Military Justice (UCMJ) and Article 3 of the Geneva Conventions. Article 3 of the Geneva Conventions was held to apply because it regulates any “conflict not of an international character occurring in the territory of one of the High Contracting Parties.” The Court concluded that because acts by terrorists are not acts between “nations,” they are conflicts “not of an international character” as that phrase is used in the Geneva Conventions.

As Justice Kennedy pointed out in his concurrence, joined by Justices Souter, Ginsburg and Breyer, Congress required in the UCMJ, and Article 3 of the Geneva Conventions requires, that military commissions be “regularly established.” Such commissions are not so established, he said, unless any differences between their structure and procedures and those used by courts-martial are required by practical reasons which the government must be prepared to explain. Justice Kennedy supported this legal requirement in part by noting that the UCMJ provides that all rules and regulations made under the Act “shall be uniform so far as practicable.” Justice Kennedy supported this interpretation by reasoning that the separation of powers would be violated unless the commissions were more independent of the executive than was true in their present structure, which collected many functions (setting up commissions; determining how many judges will sit, with a minimum of 3, but not 5 as is typical for court-martial proceedings; selecting the presiding officer; and exercising supervisory power during the trial) in a single executive officer, the “Appointing Authority,” and created special review procedures rather than using review procedures created by Congress. Further, the procedures ordered to be used in the military commissions, such as admitting all evidence “having probative

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value to a reasonable person,” deviated from rules provided in the UCMJ, without the government having made a demonstration of practical need for the special rules either in this case or generally.  

Justice Breyer wrote a concurring opinion, joined by Justices Kennedy, Souter, and Ginsburg. That concurrence underscored that while Congress had not given the President a “blank check” to create military tribunal procedures on his own, nothing prevents the President from going to Congress to seek the authority he believes necessary to create military commissions of the kind he thinks necessary. As noted at § 11.3.3 nn.18-20, such later statutory action would trump any contrary provisions in the UCMJ or Geneva Conventions, since whichever is past last controls.

The three dissents in Hamdan are consistent with the conservative predisposition in separation of powers cases to favor broader grants of executive power, as noted at § 9.1.1 n.14. One conservative dissent by Justice Thomas, joined by Justice Scalia and joined in part by Justice Alito, would have granted greater deference to the President’s judgment that his actions were authorized by Congress, did comply with the UCMJ, and did satisfy the Geneva Conventions. In part of his dissent, joined by Justice Scalia, Justice Thomas concluded that Article 3 of the Geneva Conventions did not apply, in part because the Court should defer to the President’s view that since the war on terrorism was of “international scope” it was a conflict “of an international character” for purposes of the Geneva Conventions.

In a separate dissent, Justice Alito noted that even if Article 3 of the Geneva Conventions applied, it imposes only three requirements: sentences may be imposed only by (1) a “court,” (2) that is “regularly constituted,” and (3) that affords “all the judicial guarantees which are recognized as indispensable by civilized peoples.” Relying on Webster’s Dictionary, Justice Alito said that “regularly constituted” means properly appointed, set up, or established. Whether that is so should be determined by the domestic law of the appointing country, and under United States law there is no basis for the majority’s conclusion that a military court cannot be regarded as “regularly established” unless a practical need explains why it deviates from conventional court-martial standards. Nor does Article 3 require that trials be held in military courts or courts similar in structure and composition, as its drafters certainly could, but did not, use language to express that thought more directly. Further, the commentary on Article 3 says that it is only “summary justice” which it is intended to prohibit. The commissions created by the President met this standard, concluded Justice Alito, and there is no basis for the Court to strike down the commissions because their rules can be changed from time to time by the Secretary of Defense.

25 Id. at 2799-2808 (Kennedy, J., joined by Souter, Ginsburg & Breyer, JJ., as to Parts I & II, concurring in part).

26 Id. at 2799 (Breyer, J., joined by Kennedy, Souter & Ginsburg, JJ., concurring).

27 Id. at 2823-49 (Thomas, J., joined by Scalia, J., and by Alito, J., except for Parts I, II-C-1, and III-B-2, dissenting).

28 Id. at 2850-55 (Alito, J., joined by Scalia & Thomas, JJ., as to Parts I, II, & III, dissenting).
As a preliminary matter, the Court held that it had jurisdiction to hear the appeal from the denial of a petition for habeas corpus by an alien detained at Guantanamo Bay, despite a recently enacted statute purporting to deprive federal courts of jurisdiction over habeas corpus applications filed by such persons. The Court held that the statute, properly interpreted, did not apply to actions, such as this one, which were pending when the statute was enacted.29 This conclusion is consistent with the Court’s predisposition, discussed at § 2.1.1 n.2, to read limitations on the Court’s jurisdiction narrowly. In his dissent, Justice Scalia, joined by Justices Thomas and Alito, concluded that the statutory exception was clear, and that the Court should not have heard the case at all.30 Chief Justice Roberts did not participate in Hamdan, having been part of the court of appeals panel that had heard the case, prior to his nomination and confirmation as Chief Justice. Justice Roberts’ views on that panel tracked the dissenting Justices in Hamdan.31

Given the Supreme Court’s precedents in Dames & Moore through Hamdan, it is unlikely that any future President would attempt to try “enemy combatants” without congressional authorization. While President Lincoln did unilaterally suspend the writ of habeas corpus at the beginning of the Civil War, a district court held that suspension unlawful in Ex parte Merryman32 concluding that suspension is for Congress, not the President. This view is supported by the placement of the clause authorizing suspension of habeas corpus in Article I, rather than Article II.

Similarly, unilateral action by President Bush prior to 2007 to evade procedures regarding warrantless wiretaps in the Foreign Intelligence Surveillance Act of 1978 raised serious constitutional concerns.33 Subsequent to the November 2006 elections, Congress did authorize warrantless wiretapping for national security reasons along the lines of existing executive practice by passing a bill in August, 2007, which President Bush signed, amending the Foreign Intelligence Surveillance Act (FISA). Such congressional action removes the separation of powers challenge to the practice of warrantless wiretapping. A further version of a warrantless wire-tapping law, giving telecommunications companies immunity for following presidential directives issued before Congress acted, and thus acted possibly unlawfully, was passed by Congress and signed into law by President Bush in July, 2008. This law was upheld as constitutional in In re National Security Agency Telecommunications Records Litigation.34 Of course, even with congressional approval,

29 Id. at 2762-72 (Stevens, J., opinion for the Court).

30 Id. at 2810-23 (Scalia, J., joined by Thomas & Alito, J.J., dissenting).

31 Id. at 2758-59 (Roberts, C.J., took no part in the consideration or decision of the case); Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

32 17 F. Cas. 144, 153 (1861).


34 671 F.3d 881 (9th Cir. 2011).
arguments exist about possible Fourth Amendment search and seizure problems with the FISA process, or other aspects of national security surveillance of citizens.\footnote{See, e.g., Emily Berman, \textit{The Paradox of Counterterrorism Sunset Provisions}, 81 Fordham L. Rev. 1777 (2013).}

\section*{\S~12.4 ~Military Detention Issues and Related Matters}

\subsection{Detention for United States Citizens}

A few cases have come before the Supreme Court since 2001 concerning the due process rights of persons detained outside the regular criminal justice system, such as alleged terrorists captured after September 11, 2001 as part of the “war on terror,” or enemy combatants held as a result of other military action. In these cases, the Court has reached decisions on narrow grounds, not providing detailed guidance. However, certain principles seem reasonably clear. To the extent alleged terrorists or enemy combatants, whether United States citizens or aliens, are granted rights similar to military personnel in court-martial proceedings under the Uniform Code of Military Justice, due process concerns would easily be met.\footnote{See generally Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, \textit{Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts}, 167 Mil. L. Rev. 74 (2001).} Similarly, to the extent such individuals were treated as captured prisoners of war under the Geneva Conventions, due process would be met.\footnote{See Brett Shumate, \textit{New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan}, 18 N.Y. Int'l L. Rev. 1 (2005).}

In \textit{Hamdi v. Rumsfeld},\footnote{542 U.S. 507, 509, 531 (2004) (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ).} excerpted below, a plurality of Justice O’Connor, joined by Chief Justice Rehnquist, and Justices Kennedy and Breyer, concluded that “although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” Four Justices in \textit{Hamdi} disagreed with the plurality’s conclusion that Congress had authorized the military detention of citizens as enemy combatants through the “Force Resolution” passed after September 11, 2001. Justice Scalia read the Habeas Corpus Clause, Article I, § 9, cl. 2, to give the Congress no independent power to authorize military detentions of citizens absent suspension of the Writ of Habeas Corpus, a position joined by Justice Stevens.\footnote{Id. at 554 (Scalia, J., joined by Stevens, J., dissenting).} Adopting a less extreme position, Justices Souter and Ginsburg required a clear statement from Congress to authorize such detentions, which
they said did not exist in this case. Justice Thomas agreed in Hamdi with the plurality that Congress had authorized military detention in these circumstances, providing a fifth vote for this conclusion. Reflecting the conservative predisposition to defer to the President, he would not have the Court impose any due process limitations on such military confinement. Justice Thomas noted, “Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them.” Following the Hamdi case, the government choose to release Mr. Hamdi, rather than prosecute him. His release was based on an agreement that he would give up his United States citizenship, relocate in another country, Saudi Arabia, and consent not to travel to an extensive list of countries, including Afghanistan, Iran, Iraq or Syria, where he could be presumably be recruited for terrorist activity.

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Hamdi v. Rumsfeld

Justice O’CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER, joined.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ("the AUMF"), 115 Stat 224. Soon thereafter, the President

40 Id. at 540 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

41 Id. at 579 (Thomas, J., dissenting).

42 Jerry Markon, Hamdi Returned to Saudi Arabia, Washington Post, at A02 (October 12, 2004).
ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born an American citizen in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely – without formal charges or proceedings – unless and until it makes the determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus under 28 U.S.C § 2241 in the Eastern District of Virginia, naming as petitioners his son and himself as next friend.

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U.S.C. § 4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 et seq., which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II. H.R. Rep. No.
The Government again presses two alternative positions. First, it argues that § 4001(a), in light of its legislative history and its location in Title 18, applies only to "the control of civilian prisons and related detentions," not to military detentions. Brief for Respondents 21. Second, it maintains that § 4001(a) is satisfied, because Hamdi is being detained "pursuant to an Act of Congress" – the AUMF. Id., at 21-22. Again, because we conclude that the Government's second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." Ex parte Quirin, 317 U.S., at 28. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.'" (citations omitted); cf. In re Territo, 156 F.2d 142, 145 (CA9 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released" (footnotes omitted)).

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In Quirin, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. 317 U.S., at 20. We held that "[c]itizens 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 law of war." Id., at 37-38. While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities. See id., at 30-31. See also Lieber Code, P 153, Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 Lieber, Miscellaneous Writings, p 273 (contemplating, in code binding the Union Army during the Civil War, that "captured rebels" would be treated "as prisoners of war"). Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the indefinite detention to which he is now subject. The Government responds that "the detention of enemy combatants during World War II was just as 'indefinite' while that war was being fought." Id., at 16. We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." Ibid. The prospect Hamdi raises is therefore not far-fetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3406, T. I. A. S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV), supra, Oct. 18, 1907, 36 Stat 2301 ("conclusion of peace" (Art. 20)); Geneva Convention, supra, July 27, 1929, 47 Stat 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Praust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L. J. 503, 510-511 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 T. I. A. S., at 3384, 3392, 3406, 3418)).
Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, e.g., Constable, U.S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html (as visited June 8, 2004, and available in the Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. Brief for Petitioners 16. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." Brief for Respondents 46. Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. U.S. Const., Art. I, § 9, cl. 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"). Only in the rarest of circumstances has Congress seen fit to suspend the writ. See, e.g., Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of April 20, 1871, ch 22, § 4, 17 Stat 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See INS v. St. Cyr, 533 U.S. 289, 301 (2001). All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241. Brief for Respondents 12. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may,
under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. Brief for Respondents 26. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. Id., at 34 ("Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination" (citing Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445, 455-457 (1985) (explaining that the some evidence standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion"). Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one. Brief for Respondents 36; see also 316 F.3d at 473-474 (declining to address whether the "some evidence" standard should govern the adjudication of such claims, but noting that "[t]he factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm" the legality of Hamdi's detention).

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 69 (2001); Addington v. Texas, 441 U.S. 418, 425-427 (1979). He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," Brief for Petitioners 21, and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review." App. 291.

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a
constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U.S. Const., Amdt. 5, is the test that we articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). Mathews dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U.S., at 335. The Mathews calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards." Ibid. We take each of these steps in turn.

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest . . . affected by the official action," ibid., is the most elemental of liberty interests – the interest in being free from physical detention by one's own government. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action")

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. Brief for Respondents 46-49. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies
has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action"); see also United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. Mathews, 424 U.S., at 335.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. See Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'") (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)); Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (quoting Ward v. Monroeville, 409 U.S. 57, 61-62 (1972)). "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. 223 (1864); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (other citations omitted)). These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of Mathews, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional

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value in light of the burden on the Government. 424 U.S., at 335. [FN 2: Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.]

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized.

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

The plurality . . . accept[s] the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by § 4001(a), that is, by the Authorization for Use of Military Force, 115 Stat. 224 (hereinafter Force Resolution). Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001(a). Should the severity of the Act be relaxed when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act “pursuant” to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification [stated later in the concurrence of “acting in accordance with customary law of war”], the answer has to be no. For a number of reasons, the prohibition within § 4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.

Congress's understanding of the need for clear authority before citizens are kept detained is itself therefore clear, and § 4001(a) must be read to have teeth in its demand for congressional authorization.
Next, there is the Government's claim, accepted by the plurality, that the terms of the Force Resolution are adequate to authorize detention of an enemy combatant under the circumstances described, a claim the Government fails to support sufficiently to satisfy § 4001(a) as read to require a clear statement of authority to detain. Since the Force Resolution was adopted one week after the attacks of September 11, 2001, it naturally speaks with some generality, but its focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But, like the statute discussed in Endo [323 U.S. 283 (1944)], it never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit. See, e.g., 18 U.S.C. § 2339A (material support for various terrorist acts); § 2339B (material support to a foreign terrorist organization); § 2332a (use of a weapon of mass destruction, including conspiracy and attempt); § 2332b(a)(1) (acts of terrorism transcending national boundaries,” including threats, conspiracy, and attempt); § 2339C (2000 ed., Supp. II) (financing of certain terrorist acts); see also 18 U.S.C. § 3142(e) (pretrial detention). See generally Brief for Janet Reno et al. as Amici Curiae in Rumsfeld v. Padilla, O.T.2003, No. 03-1027, pp. 14-19, and n.17 (listing the tools available to the Executive to fight terrorism even without the power the Government claims here); Brief for Louis Henkin et al. as Amici Curiae in Rumsfeld v. Padilla, O.T.2003, No. 03-1027, p. 23, n.27.

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. See Screws v. United States, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result). Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the
burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.

Subject to these qualifications, I join with the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case.

Justice SCALIA, with whom Justice STEVENS joins, dissenting.

Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. Cf. Act of Mar. 3, 1863, 12 Stat. 755. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force, 115 Stat. 224, which provides:

"That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a).

This is not remotely a congressional suspension of the writ, and no one claims that it is. Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns.

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared, "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free." The Federalist No. 8, p. 33.

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis — that, at the extremes of military exigency, inter arma silent leges. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the
interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

Justice THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of Mathews v. Eldridge, 424 U.S. 319 (1976). I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. I cannot improve on Justice Jackson's words, speaking 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 to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions 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 to 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." [Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)].

Several points, made forcefully by Justice Jackson, are worth emphasizing. First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because "[t]hey are delicate, complex, and involve large elements of prophecy." Ibid. Third, the Court in
Chicago & Southern Air Lines and elsewhere has correctly recognized the primacy of the political branches in the foreign-affairs and national-security contexts.

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, a fortiori, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42-43. See also App. 347-351 (affidavit of Col. D. Woolfolk). Equally obvious is the Government's interest in not fighting the war in its own courts, see, e.g., Johnson v. Eisentrager, 339 U.S., at 779, and protecting classified information, see, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (President's "authority to classify and control access to information bearing on national security and to determine" who gets access "flows primarily from [the Commander-in-Chief Clause] and exists quite apart from any explicit congressional grant"); Agee, 453 U.S., at 307 (upholding revocation of former CIA employee's passport in large part by reference to the Government's need "to protect the secrecy of [its] foreign intelligence operations"). [FN 7: These observations cast still more doubt on the appropriateness and usefulness of Mathews v. Eldridge, 424 U.S. 319 (1976), in this context. It is, for example, difficult to see how the plurality can insist that Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand, when new information could become available to the Government showing that such access would pose a grave risk to national security. In that event, would the Government need to hold a hearing before depriving Hamdi of his newly acquired right to counsel even if that hearing would itself pose a grave threat?]

2. Detention for an Alien Terrorist or Enemy Combatant

Following Hamdan and Hamdi, in October, 2006, Congress passed, and President Bush signed, the Military Commissions Act of 2006, setting out procedures to govern trial of alien unlawful enemy combatants. In the Act, enemy combatants were defined broadly as any individual determined by the President, or presidential designate, to have “purposefully and materially” supported anti-United States hostilities and is not part of a country’s regular armed forces – who are foreign nationals. The ad hoc nature of the existing process before this statute was passed had naturally caused due process problems. In the Act, Congress expanded the evidence that could be used at trial from traditional

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See Haley A. Andrews, How Far is Too Far?: The Supreme Court’s Response to the Executive Attempt to Improvise Constitutional Procedures During the War on Terror, 36 Cumb. L. Rev. 123 (2005-2006); Randolph N. Jonakait, Rasul v. Bush: Unanswered Questions, 13 Wm. &
UCMJ procedures – both expanded hearsay evidence and evidence from coerced confessions, although not from torture, as long as the evidence meets a generic test of “probative value to a reasonable person.” The remaining procedures, which are reasonably close to the UCMJ and Geneva Conventions, particularly regarding the right of the accused to be present at trial and have access to information used to convict, likely satisfy due process concerns.

The provision which raised the greatest concern with constitutionality was the ban on any habeas corpus petition being filed by a detainee. As discussed at § 2.1.1 nn.1-2, prior cases have upheld Congress’ right to strip federal courts of habeas jurisdiction, but no prior statute had stripped federal court review of such a potentially large number of cases, a concern discussed at § 2.1.3 nn.7-10. In practice, foreign national unlawful enemy combatants could be indefinitely detained without any access to the judicial system for review of their status as enemy combatants. As discussed below at § 12.4.2 nn.44-52, while conservative formalist and Holmesian Justices deferred to the government in Boumediene v. Bush, a combination of natural law and liberal instrumentalist Justices caused the Court to strike down that part of the statute on structural separation of powers grounds. Of course, without regard to its constitutionality, one can question whether it is good policy, either from a domestic perspective, or in terms of standing in the world community, to remove the ancient writ of Habeas Corpus, which goes back to the Magna Carta in 1215, in this class of cases. A related issue that exists regards the right of public access, if any, to any tribunals which are ultimately created.43

In Boumediene v. Bush,44 the Court considered the due process and habeas rights of alien enemy combatants held at Guantanamo Bay. All parties agreed that Congress had not formally suspended the writ of habeas corpus in passing the Military Commissions Act. In that circumstance, a 5-4 Court held that aliens designated as enemy combatants and detained at Guantanamo Bay have the right of habeas corpus. Regarding habeas corpus for aliens detained in areas under United States control, Congress had passed the Detainee Treatment Act of 2005 (DTA). Section 1005(e) of that Act provided that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained at Guantanamo.” The Act gave the D.C. Circuit “exclusive” jurisdiction to review decisions of the Combatant Status Review Tribunals (CSRT). Those Tribunals had been established by Congress to determine whether individuals detained at Guantanamo were “enemy combatants.” Under the Military Commissions Act of 2006 (MCA), the DTA removal of habeas jurisdiction was stated to apply to existing enemy combatants held at Guantanamo Bay, not merely those captured subsequent to the date of the Act.


43 See generally Jeffrey S. Koweek, Enemy Combatant Status Hearings: Predicting the Right of Access by the Press and the Public, 3 First Amendment L. Rev. 373 (2005).

In *Boumediene*, the Supreme Court held that the congressional action taken in CSRT, DTA, and MCA was an inadequate substitute for habeas corpus and, thus, improperly modified the writ. The reason for such inadequacy, given by Justice Kennedy, writing for himself and Justices Stevens, Souter, Ginsburg, and Breyer, was that the DTA does not permit the Court of Appeals to make the requisite findings of fact needed in a habeas corpus proceeding because the Act does not allow the detainee to present exculpatory evidence discovered after CSRT proceedings have concluded. Justice Kennedy left for future decision a number of questions, such as when other such cases might be channeled to the district court that will hear the cases currently before the Court, the evidentiary and right-to-counsel issues that may arise, and the content of the law that governs petitioners’ detention.\(^{45}\)

Justice Kennedy’s opinion cited history and precedent, as well as the literal words of the Constitution, but, ultimately, what appeared to carry the opinion were important general principles of separation of powers and adherence to the rule of law. Here are several quotations: (1) “The [Habeas Corpus] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.” (2) “[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.” (3) “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”\(^{46}\)

Chief Justice Roberts was joined in dissent by Justice Scalia, Thomas, and Alito. Reflecting his Holmesian deference-to-government decisionmaking style, Roberts criticized Justice Kennedy’s opinion for not being sufficiently deferential to decisions by Congress and military authorities. Roberts criticized what he called the majority’s “ambitious opinion” as being really about control by the judiciary of federal policy regarding enemy combatants. Roberts said that the system created by Congress protects whatever rights the detainees may possess. As for use of later discovered exculpatory evidence, Roberts noted that the D.C. Circuit has power to remand a case to the tribunal below to allow that body to consider such evidence in the first instance.\(^{47}\)

Justice Scalia also dissented, joined by Chief Justice Roberts and Justices Thomas and Alito. Uncharacteristically, Scalia began with an analysis of projected consequences. Henceforth, he said, “how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”\(^{48}\) Most of Scalia’s opinion, however, was based on typical formalist focus on text and history. He concluded that the writ of habeas corpus

\(^{45}\) *Id.* at 2272-77.

\(^{46}\) *Id.* at 2247, 2259, 2277.

\(^{47}\) *Id.* at 2279-80, 2289-90 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).

\(^{48}\) *Id.* at 2296 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting).
does not, and never has, run in favor of aliens who have never been within the “territorial jurisdiction” of the United States, as supported by language in Johnson v. Eisentrager. Since Guantanamo Bay is not literally United States territory, Scalia said, that should end the matter.49

Justice Kennedy said in reply that the reference in Eisentrager to “territorial jurisdiction” was a reference to one of several factors used in a “functional” test to determine whether habeas corpus is available. Under that test the Court should consider the objective degree of control over the location, the practicability of having a trial there, and the availability of possible alternatives. Under this functional test, de jure sovereignty is a factor that bears on the applicability of constitutional guarantees, but questions of extraterritoriality turn on objective factors and practical concerns, not formalism – and the United States has practical control over Guantanamo Bay.50

Evaluating this case is not easy. On the one hand it is reassuring that the Court protected the writ of habeas corpus as a fundamental principle51 On the other hand, as Chief Justice Roberts noted in dissent, “So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas rights . . . Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.”52

Since Boumediene, cases involving enemy combatants have been tried. In some of these cases, the detainees have been ordered released – officially designated as No Longer Enemy Combatant (NLEC) – due to a lack of evidence even under flexible evidentiary standards suggested in Hamdi and Boumediene. In other cases, individuals have been detained, and their cases appealed to the Court of Appeals for the District of Columbia. In these cases, the procedures adopted below have been held adequate to satisfy due process concerns, including shifting the burden to the detainee to prove innocence under a preponderance of the evidence standard; use of hearsay testimony, as long as it is “reliable”; and requiring the detainee to explain why any discovery request would not unduly

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49 Id. at 2296-2302.

50 Id. at 2253-62.

51 See id. at 2277-79 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring), citing Rasul v. Bush, 542 U.S. 466, 481 (2004) (noting that the holding should not be a surprise, as a 5-4 Court wrote in Rasul v. Bush that “[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus”; “After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value . . . .”)

52 Id. at 2293 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).
burden the government. Of the more than 700 prisoners detained at Guantanamo Bay, 242 remained in January 2009 when President Obama took office; 116 remained as of June 2015; 81 remained as of June 2016; and only 41 remained by January 2017. Many of these had been cleared for release earlier, but remained due to difficulties repatriating them, including a Congressional requirement, eased in 2013, that the United States certify the prisoner will not engage in conduct against the United States if released. Estimates vary, but the Office of Director of National Intelligence estimated in July 2016 that of the prisoners then released from Guantanamo Bay (693: 532 under Bush and 161 under Obama) 122 have returned to terrorist activities (113 of 532 released under Bush (21.2%) and 9 of 161 released under Obama (5.6%)) and 86 more are suspected of so returning (75 of 532 released under Bush (14.1%) and 11 of 161 released under Obama (6.8%)).

Of the 41 prisoners at Guantanamo Bay when President Trump took office, 40 remain. One prisoner was transferred to Saudi Arabia in May 2018 for continued incarceration there. Of the remaining 40 prisoners, while accounts by human rights groups and the New York Times slightly differ, a good approximation is that 4 are recommended for transfer; 10 are either in pre-trial or trial proceedings; 3 have been convicted; and 23 are “high-value detainees” (this concept also part of Bush and Obama Administration policy) who may be subjected to indefinite detention, a dubious practice the Court may have to confront in terms of habeas and due process concerns. Cf. United States v. Ghailani, 733 F.3d 20 (2nd Cir. 2013) (Sixth Amendment speedy trial clause not violated by 5-year delay in trial). During 2013-14, more than 100 prisoners engaged in a hunger strike to protest their continued captivity. More than 40 of these prisoners had to be force-fed to keep them alive. See Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2013) (force-feeding likely does not violate prisoner’s due process rights). See generally Allaithi v. Rumsfeld, 753 F.3d 1327 (D.C. Cir. 2014) (former detainees at Guantanamo Bay cannot bring claims against captors, who were acting within scope of employment as defined in Westfall Act, 28 U.S.C. § 2679(d)(1); claim must be brought against United States under Federal Tort Claims Act); Al Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (4th Cir. 2014) (former Abu Ghirab inmates who claim they were tortured by U.S. government contractors in Iraq state viable Federal Tort Claims Act case); Turkmen v. Hasty, 789 F.3d 218 (2nd Cir. 2015) (Arab and Muslim alien detainees held after 9/11 and subjected to prolonged detention state plausible due process claim against Attorney General, FBI Director, and Commissioner of Immigration and Naturalization Service (now ICE: Immigration & Customs Enforcement)).

3. Additional Considerations Regarding Detention of Terrorists or Enemy Combatants

In Rumsfeld v. Padilla, a 5-Justice majority ruled narrowly that “[w]henever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement.” In the Padilla case,
although Mr. Padilla had originally been held in the Southern District of New York, by the time he filed his writ of habeas corpus in that district, he had been moved to South Carolina. Thus, he needed to refile his habeas petition there. Justices Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They stated: “All Members of this Court agree that the immediate custodian rule should control in the ordinary case and that habeas petitioners should not be permitted to engage in forum shopping. . . . More narrowly, we agree that if jurisdiction was proper when the petition was filed, it cannot be defeated by a later transfer of the prisoner to another district. Ex parte Endo, 323 U.S. 283, 306 (1944).”55 The dissent was likely concerned that the government had engaged in opportunistic forum shopping on its own by transferring Padilla at the last minute to a federal district, in this case South Carolina, where the district court might be more sympathetic to the government in the conduct of any later proceedings.56 The government indicted Padilla in November 2005 for traveling “overseas to train as a terrorist with the intention of fighting a violent jihad," although any allegations involving plotting to carry out a "dirty bomb" attack in this country, for which Padilla was originally detained, were not included in the indictment. On August 16, 2007, Jose Padilla was convicted for aiding and assisting Al Qaeda in terrorist operations overseas. Notwithstanding the reduced charges, on January 22, 2008, Mr. Padilla was sentenced to 17 years, 4 months in prison, which he is serving in a federal high-security facility. His suit against John C. Yoo, a former high-level Department of Justice official, was held barred under the doctrine of qualified immunity because it was not well-settled in 2001-03 that his treatment while in the brig in Charleston, South Carolina constituted torture.57

The due process issues involved in these “war on terrorism” cases are naturally arising in other countries with similar traditions of due process concerns as in America. For example, in Britain, a court ruled key provisions of the British anti-terrorism law, which allowed a form of house arrest for suspected terrorists, to be an “affront to justice” and incompatible with European and British human rights law. British courts have also ruled unlawful the indefinite detention of suspected terrorists, forcing, in the particular case, the release of eight suspects, all Muslim men, who had been detained for up to 3½ years.58 Similar challenges may be brought before courts in America to various provisions of the USA Patriot Act, among other pieces of anti-terrorist legislation.59

55 Id. at 458 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).


57 Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).


A related issue concerns the law regarding acts of torture. Under customary international law, the prohibition of torture is *jus cogens* – a peremptory norm that is non-derogable under any circumstances, binding on all nations, on par with prohibitions against slavery and genocide. In addition, the United States ratified in 1990 the United Nations Convention Against Torture. To meet its obligations under that Convention, in 1994 Congress criminalized acts of torture committed outside the United States in 18 U.S.C. § 2340. For government acts within the United States, the Eighth Amendment ban on “cruel and unusual punishment” would apply. The Torture Victims Protection Act of 1991 provides civil tort liability for any “individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture.” The Court has held that the term “individual” in the Act refers only to natural persons, meaning the statute does not impose liability against organizations for acts of torture or extrajudicial killing.60

The definition of what constitutes torture is subject to some dispute. The issue has received greater attention since September 11, 2001 following two Department of Justice memos adopting narrow definitions of what constitutes torture under 18 U.S.C. § 2340. Under the first memo, the “Bybee” memo, drafted in August 2002, “The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function would likely result.” That memo also adopted a narrow view of the intent component defining torture, requiring the torturer to act with the “precise and express objective” of inflicting severe pain.61

Following intense public criticism of the Bybee memo, once it became public in June 2004, the Bush Administration submitted a new memorandum, called the “Levin” memo, in December 2004. In this memo, the definition of torture was left more vague, but the memo described the severe pain necessary for torture as falling below the level described in the Bybee memo, but above the level of pain derived from cruel and inhuman treatment. The Levin memo also indicated that torture may involve either severe physical suffering or severe physical pain. The Levin memo also retracted the Bybee memo’s language regarding a “precise and express objective” to inflect pain, but did not provide any further clarification, other than to state that it is not enough to act with knowledge that such pain “was reasonably likely to result” from actions or “is certain to occur.”62

The existence of these memos, and the belief that American practices regarding torturing suspects in detention have changed since September 11, 2001, has caused the United States government

60 Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012). On these provisions, see generally GAIL H. MILLER, DEFINING TORTURE 2-3, 25-29 (Floersheimer Center for Constitutional Democracy, December 2005)

61 This discussion of the Bybee and Levin Memos is based on Gail Miller’s treatment in GAIL MILLER, supra note 60, at 26.

62 Id. at 26-28. See Auguste v. Ridge, 395 F.3d 123, 138-47 (3rd Cir. 2005) (deplorable prison conditions an alien faces in Haiti after being deported for criminal activity do not constitute torture, as torture requires a specific intent to cause severe physical or mental pain and suffering).
public relations problems. For example, in holding that three British residents held at Guantanamo Bay may take legal action to try to force the British Government to facilitate their release, a British judge observed the United States’ current idea of what constitutes torture is “not the same as ours and doesn’t appear to coincide with that of most civilized countries.”63 Secretary General of the United Nations, Kofi Annan, indicated his belief in 2006 that the United States should shut the Guantanamo Bay camp "without further delay" and try the detainees held there or release them.64

Another issue that has arisen involves the issue whether a United States citizen, who alleges being arrested, tortured, and detained by agents of a foreign government at the behest of the United States, may seek habeas corpus relief in United States federal district courts because he is “in custody under or by color of the authority of the United States” or “in custody in violation of the Constitution or laws or treaties of the United States.” In Abu Ali v. Ashcroft,65 a federal district court held that such a United States citizen could seek habeas relief. In contrast, foreign nationals held by other countries do not have a right to seek habeas relief, even if held at the behest of the United States.66

In Munaf v. Geren,67 a unanimous Supreme Court held that while the federal courts have jurisdiction to consider petitions for habeas corpus filed on behalf of American citizens held in custody by the United States, even if held overseas, simply because such jurisdiction exists is not a sufficient to grant a preliminary injunction against transferring individuals to that sovereign’s government for criminal prosecution. On the merits, habeas corpus should not be granted on the basis that the other country’s criminal procedures do not provide all of the protections afforded by the Constitution. Further, a claim that the other country engages in torture is for the political branches, not the judiciary, to consider. Finally, there is no rule forbidding the United States from transferring a citizen to another sovereign for criminal prosecution without a specific legal authority to do so given by act of Congress or the terms of a treaty where, as here, the detained persons voluntarily traveled to that country, and it is the very sovereign – Iraq – on whose behalf they are being detained. Justice Souter, joined by Justices Ginsburg and Breyer, wrote a concurring opinion in which he sought to limit the holding to the precise facts of the case.68 Chief Justice Roberts’ majority opinion gave no indication that it was so limited.

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63 Reuters, British Judge Tells Guantanamo Detainees They Can Appeal (February 17, 2006) (yahoo.com news, search by using words in the title of the article).

64 CNN, Annan: Shut Guantanamo Prison Camp (February 17, 2006) (cnn.com news, search by using words in the title of the article).


68 Id. at 2228 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring).
4. Detention for Aliens in Immigration Proceedings

Similar issues regarding detention can exist for aliens detained because of alleged violations of immigration laws. Regarding persons detained for violations of immigration laws, the Supreme Court has held that resident aliens charged with being deportable from the United States for various offenses may be detained “for the brief period necessary for their removal proceedings” without an individualized determination that the alien poses either a danger to society or a flight risk. In *Demore v Kim*, the Court concluded detention was “reasonable” given a general concern that such aliens may continue to engage in crime or fail to appear for their hearings. Regarding longer detentions, the Court held in *Zadvydas v. Davis* that legal resident aliens likely have a due process right to be free from indefinite detention based on their status as "persons within the United States." Because indefinite detention would raise “serious constitutional concerns,” the “post-removal-period detention” statute was read to contain an implicit "reasonable time" limitation on detentions after 90 days, the application of what constitutes “reasonable time” subject to federal court review.

With regard to aliens seeking admission to the United States, the Court has stated, “[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’” It has been noted:

> While it seems straightforward to distinguish between those who are "within the United States" and those who are outside its borders, the paradoxical "entry fiction" in immigration law permits the U.S. government to treat individuals physically inside the country as though they were "continuously knocking at the gate." Immigrant parolees – noncitizens to whom the Attorney General grants a temporary stay in the United States for humanitarian or public interest reasons – fall within the purview of the entry fiction.

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70 533 U.S. 678, 682-84 (2001). *See generally* Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016) (limitation of reasonableness involves “individualized determination,” joining 3rd and 6th Circuits; 2nd and 9th Circuits hold detention longer than 6 months presumptively unreasonable); Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (detained immigrants have no statutory right to periodic bond hearings during detention) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting) (statutes grant such a right to avoid constitutional problems) (Kagan, J., not participating in decision).


PART IV: FEDERAL LIMITS ON STATE GOVERNMENTAL POWER

CHAPTER 13: CONGRESSIONAL LIMITS ON STATE POWER

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§ 13.1 Introduction to Congressional Limits on State Power

If Congress enacts a law that is constitutional, conflicting state laws are invalid because of the
Supremacy Clause. Article VI, § 2 provides: “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.” When a state law conflicts
with federal law, state law is said to be preempted by the federal law.1 Preemption is thus a statutory
issue of congressional intent, not strictly speaking a constitutional doctrine.

Even where such congressional legislation does not exist, the Court has adopted the view that
Congress, in the absence of legislation, supports a background policy of free trade among the states.
During the immediate aftermath of the Revolutionary War, England reduced commercial activities
with the newly-freed colonies in 1784-85, including restrictions placed on American merchants’
access to overseas markets, deepening an on-going recession in the new United States. In response,
many states adopted protectionist legislation to protect their own state’s commerce from
competition.2 This had the effect of retarding economic growth in the United States generally.
Faced with this reality, a meeting in Annapolis, Maryland was called and held in the summer of
1786, particularly to focus on the need to amend the 1781 Articles of Confederation to deal with this
economic problem and provide for more uniform rules regarding trade.3 Although only 5 States sent


2 See Brannon P. Denning, Confederation-Era Discrimination Against Interstate Commerce

3 On the weakness of the Articles of Confederation, and the Annapolis meeting in 1786 as
   one response, see Denning, supra note 2, at 50-59; Mark R. Killenbeck, The Physics of Federalism,
   51 U. Kansas L. Rev. 1, 23-35 (2002). See also Clifford Carrubba, Federalism, Public Opinion, and

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delegates – New York, New Jersey, Pennsylvania, Delaware, and Virginia – the problems raised at that meeting convinced the participants, including James Madison and Alexander Hamilton, to petition the states for a broader Constitutional Convention the following year. This led to the Constitutional Convention in 1787 in Philadelphia, which framed the current United States Constitution.

This history suggests support for free trade generally among the framing and ratifying generation. There is also the economic argument that free trade prompts economic growth in the long-run, and the political argument that individual state legislatures, elected by in-state citizens, may have too great a predisposition for protectionist legislation that might play well with the state electorate to the disservice of the nation as a whole.4 For these combination of reasons, the Supreme Court has always applied some version of Dormant Commerce Clause doctrine. Under this doctrine, even when Congress has been silent, certain state statutes are ruled invalid by the Supreme Court because of a view that they burden interstate commerce more than Congress would want.

Because of the formalist preference for literal text and bright-line rules, it is not surprising that Justices Scalia and Thomas have indicated a desire to abandon scrutiny of state regulations under dormant commerce clause doctrine. Reflecting formalist deference to “settled law,” noted at § 2.4.6 n.79, Justice Scalia stated in American Trucking Association, Inc. v. Michigan Public Service Commission,5 that under dormant commerce clause review the Court should ask only whether the state law “facially discriminates against interstate commerce” or whether it is “indistinguishable from a type of law previously held unconstitutional by this Court.” Justice Thomas added in American Trucking that the Court’s modern dormant commerce clause review “has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”6

On the other hand, it may be a justifiable system for Congress to rely on the Supreme Court as the first line of defense against excessive state regulation of interstate commerce. The institutional mechanisms and inertia associated with Congress are ill-suited to review thousands of state statutes that get passed each year relating to commercial matters. A more effective institutional response may well be the current system where individual litigants, if sufficiently burdened by a state law, choose to bring that complaint to a court for initial review. Congress can, of course, always overturn any court decision on dormant commerce clause grounds if Congress so wishes, since the doctrine is ultimately based not on a constitutional requirement, but rather on court attempts to determine implied congressional intent where Congress has been silent. Indeed, Congress could direct the Court to stop engaging in dormant commerce clause review, or to adopt Justice Scalia’s version of dormant commerce clause doctrine. Congress has shown no interest to do either.

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6 Id. at 439 (Thomas, J., concurring in the judgment).
§ 13.2 Preemption Doctrine

1. Historical Eras of Preemption Doctrine

During the original natural law era, between 1789-1873, the Court was not faced with many cases raising preemption issues, as the limited amount of federal regulation regarding domestic matters meant that few areas of conflict arose. When such conflicts arose, the Court did not create any preemption nuances. Instead, as in 1824 in *Gibbons v. Ogden*, the Court simply noted that if there is a collision between federal and state law, the state law must yield.

During the first part of the formalist era, 1873-1937, Congress continued to do little to regulate commerce. Later, as the need for federal economic regulation became more evident and Congress gradually became more active, the Court tended to adopt a bright-line rule that if Congress regulated in an area, Congress should be taken to have occupied the field. Thus, in *Napier v. Atlantic Coast Line*, congressional action passing the Boiler Inspection Act preempted all state laws regulating locomotive equipment, even where there was no federal rule on the state regulation in question.

The Holmesian Court, from 1937-1954, rejected this simple categorical approach to preemption doctrine, and instead adopted a more functional, weighing of factors analysis giving respect to both federal and state governmental entities. Thus, the Holmesian-era Court held in 1947 in *Rice v. Santa Fe Elevator Corp.* that if the states had traditionally occupied an area, the Court would assume that state law was not preempted by federal law unless Congress clearly so intended, as where the federal scheme was so pervasive as to leave no room for supplementation, the federal interest was dominant, or state policy produced results inconsistent with federal objectives.

The instrumentalist Court, from 1954-1986, continued this functional analysis, but added a policy component focused on the state’s purposes. If a state's purpose in regulating had protectionist overtones, the Court would more likely find preemption, as in *Campbell v. Hussey*. On the other hand, where the state’s purpose did not appear to be protectionist in nature, and merely imposed higher standards on business, the liberal predisposition in favor of government regulation more often led to a finding of no federal preemption. For example, in *Florida Lime and Avocado Growers, Inc.*

7 22 U.S. (9 Wheat.) 1, 210-11 (1824).
8 272 U.S. 605, 611-13 (1926).
9 331 U.S. 218, 229-31 (1947).
10 368 U.S. 297, 300-02 (1961) (provisions of the Georgia Tobacco Identification Act preempted by the Federal Tobacco Inspection Act, where Georgia law required that tobacco of a certain type, grown principally in Georgia, be marked with a white identification tag when received in warehouses for sale, while the federal law merely required a label truthfully showing the tobacco's official federal type). *id.* at 302-13 (Black, J., joined by Frankfurter & Harlan, JJ., dissenting) (no indication of congressional intent to preempt complementary state regulation).
v. Paul, a majority said that California requirements on certifying avocados were not preempted by federal regulations requiring avocados to be certified as mature. For the majority, Justice Brennan said the federal law concerned minimum standards, not uniform standards. Here there was no clear congressional intent to exclude state regulation.

The approach of both the majority and dissent in Florida Lime favoring non-protectionist state laws is supported by the doctrine that the burden of proof is on persons who challenge a state law to prove it has been preempted. In Ray v. Atlantic Richfield Co., in an opinion by Justice White, the Court said that state police power laws are not superseded by federal law unless the Court can find a clear and manifest congressional purpose. That purpose may be evidenced by express words. It may also be implied from the pervasiveness of a federal regulatory scheme, the dominance of federal interest in a field, or the object sought and the character of the obligations imposed by federal law. State law is also void if it conflicts with federal law. A conflict exists if compliance with both regulations is impossible or the state law stands as an obstacle to accomplishing the purposes of Congress.

2. Modern Preemption Doctrine

Since 1986, the Court has continued to use the Ray test for preemption, combined with the Rice presumption of no federal preemption in areas states have traditionally regulated. In applying these principles, however, the Justices do not always agree on: (1) when Congress has explicitly expressed an intent to preempt (express preemption); or (2) whether the Court should find that Congress has impliedly preempted state law (implied preemption). Under Ray, there are two types of implied preemption: (a) field preemption, which occurs where the scheme of federal regulation is so pervasive as to make reasonable an inference that Congress left no room for state supplementation; and (b) conflict preemption, which occurs either where (i) compliance with both state and federal regulations is physically impossible, an easy case for preemption, or (ii) where state law stands as an obstacle to accomplishing Congress' purposes.

11 373 U.S. 132, 143-46 (1963); id. at 165-74 (White, J., joined by Douglas, Black & Clark, JJ., dissenting) (California law was only to protect the good will of the avocado industry).


13 See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1943) (alien registration requirements a field preempted by the federal government, leaving no room for state regulation).

14 See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (that would be the situation in Florida Lime if, for example, the federal orders “forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.”).

Odd combinations of Justices sometimes occur in preemption cases because there are several cross-currents. The first involves differing views on how to determine congressional intent, particularly the extent to which legislative history can be used to make that determination. This is discussed below at § 13.2.2 n.17. Second, there is a cross-current caused by the conservative predisposition to defer to states, but also to be skeptical of state business regulations. Third is the cross-current caused by the liberal predisposition to defer to the federal government, but also to be supportive of state business regulation. The predispositions creating these last two cross-currents are noted at § 1.1.4 text following note 20.

A good example of implied conflict preemption involving cross-currents of predispositions, and thus unusual combinations of Justices in the Court opinions, is *Gade v. National Solid Wastes Management Association*, decided in 1992. In this case, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices White and Scalia, held that a state regulation of occupational safety and health matters, regarding which a federal OSHA standard was in effect, was impliedly preempted because it was in conflict with the full purposes and objectives of OSHA – among which was to have workers subjected to but one set of standards. Justice Kennedy agreed that there was preemption, but found it expressed in the terms of OSHA. Justice Souter dissented, with Justices Stevens, Blackmun, and Thomas. Justice Souter said the Court should presume that Congress did not intend to displace state law. Justices Stevens and Blackmun probably joined this dissent based on a policy of supporting additional state regulations of business, while Justice Thomas may have joined the dissent based on his strong support for states’ rights.

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**Gade v. National Solid Wastes Management Association**  
505 U.S. 88 (1992)

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Part II in which THE CHIEF JUSTICE, Justice WHITE, and Justice SCALIA join.

I

In 1988, the Illinois General Assembly enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat., ch. 111, PP7701-7717 (1989), and the Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat., ch. 111, PP7801-7815 (1989) (together, licensing acts). The stated purpose of the licensing acts is both "to promote job safety" and "to protect life, limb and property." PP7702, 7802. In this case, we consider whether these "dual impact" statutes, which protect both workers and the general public, are pre-empted by the federal Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U. S. C. § 651 et seq. (OSH Act), and the standards promulgated thereunder by the Occupational Safety and Health Administration (OSHA).

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16 505 U.S. 88, 96-109 (1992); id. at 110-14 (Kennedy, J., concurring in part and concurring in the judgment); id. at 114-122 (Souter, J., joined by Stevens, Blackmun & Thomas, JJ., dissenting).

In response to this congressional directive, OSHA, to which the Secretary has delegated certain of her statutory responsibilities, see Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 147, n.1 (1991), promulgated regulations on "Hazardous Waste Operations and Emergency Response," including detailed regulations on worker training requirements. 51 Fed. Reg. 45654, 45665-45666 (1986) (interim regulations); 54 Fed. Reg. 9294, 9320-9321 (1989) (final regulations), codified at 29 CFR § 1910.120 (1991). The OSHA regulations require, among other things, that workers engaged in an activity that may expose them to hazardous wastes receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the supervision of a trained supervisor. § 1910.120(e)(3)(I). Workers who are on the site only occasionally or who are working in areas that have been determined to be under the permissible exposure limits must complete at least 24 hours of off-site instruction and one day of actual field experience. §§ 1910.120(e)(3)(ii) and (iii). On-site managers and supervisors directly responsible for hazardous waste operations must receive the same initial training as general employees, plus at least eight additional hours of specialized training on various health and safety programs. § 1910.120(e)(4). Employees and supervisors are required to receive eight hours of refresher training annually. § 1910.120(e)(8). Those who have satisfied the training and field experience requirement receive a written certification; uncertified workers are prohibited from engaging in hazardous waste operations. § 1910.120(e)(6).

In 1988, while OSHA's interim hazardous waste regulations were in effect, the State of Illinois enacted the licensing acts at issue here. The laws are designated as acts "in relation to environmental protection," and their stated aim is to protect both employees and the general public by licensing hazardous waste equipment operators and laborers working at certain facilities. Both licensing acts require a license applicant to provide a certified record of at least 40 hours of training under an approved program conducted within Illinois, to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. Ill. Rev. Stat., ch. 111, PP7705(c) and (e), 7706(c) and (d), 7707(b), 7805(c) and (e), 7806(b). In addition, applicants for a hazardous waste crane operator's license must submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours." P7705(d). Employees who work without the proper license, and employers who knowingly permit an unlicensed employee to work, are subject to escalating fines for each offense. PP7715, 7716, 7814.

The respondent in this case, National Solid Wastes Management Association (Association), is a national trade association of businesses that remove, transport, dispose, and handle waste material, including hazardous waste. The Association's members are subject to the OSH Act and OSHA regulations, and are therefore required to train, qualify, and certify their hazardous waste
remediation workers. 29 CFR § 1910.120 (1991). For hazardous waste operations conducted in Illinois, certain of the workers employed by the Association's members are also required to obtain licenses pursuant to the Illinois licensing acts. Thus, for example, some of the Association's members must ensure that their employees receive not only the 3 days of field experience required for certification under the OSHA regulations, but also the 500 days of experience (4,000 hours) required for licensing under the state statutes.

Shortly before the state licensing acts were due to go into effect, the Association brought a declaratory judgment action in United States District Court against Bernard Killian, the former Director of the Illinois Environmental Protection Agency (IEPA); petitioner Mary Gade is Killian's successor in office and has been substituted as a party pursuant to this Court's Rule 35.3. The Association sought to enjoin IEPA from enforcing the Illinois licensing acts, claiming that the acts were pre-empted by the OSH Act and OSHA regulations and that they violated the Commerce Clause of the United States Constitution.

We granted certiorari, 502 U.S. 1012 (1991), to resolve a conflict between the decision below and decisions in which other Courts of Appeals have found the OSH Act to have a much narrower pre-emptive effect on "dual impact" state regulations. See Associated Industries of Massachusetts v. Snow, 898 F.2d 274, 279 (CA1 1990); Environmental Encapsulating Corp. v. New York City, 855 F.2d 48, 57 (CA2 1988); Manufacturers Assn. of Tri-County v. Knepper, 801 F.2d 130, 138 (CA3 1986), cert. denied, 484 U.S. 815 (1987); New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 593 (CA3 1985).

II


In the OSH Act, Congress endeavored "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To that end, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce, 29 U.S.C. § 651(b)(3), and thereby brought the Federal Government into a field that traditionally had been occupied by the States. Federal regulation of the workplace was not intended to be all encompassing, however. First, Congress expressly saved two areas from federal pre-emption. Section 4(b)(4) of the OSH Act states that the Act does not "supersede or in any manner affect any workmen's compensation law or ... enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). Section 18(a) provides that the Act does not "prevent any State agency or court from asserting jurisdiction under
State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. § 667(a).

Congress not only reserved certain areas to state regulation, but it also, in § 18(b) of the Act, gave the States the option of pre-empting federal regulation entirely. That section provides:

"Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.

"Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary under the OSH Act] shall submit a State plan for the development of such standards and their enforcement." 29 U. S. C. § 667(b).

About half the States have received the Secretary's approval for their own state plans as described in this provision. 29 CFR pts. 1952, 1956 (1991). Illinois is not among them.

In the decision below, the Court of Appeals held that § 18(b) "unquestionably" pre-empts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the Secretary's approval for its own plan. 918 F.2d at 677. Every other federal and state court confronted with an OSH Act pre-emption challenge has reached the same conclusion, and so do we.

Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 152-153 (1982). 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," id., at 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)), and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971).

Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole. Looking to "the provisions of the whole law, and to its object and policy," Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (internal quotation marks and citations omitted), we hold that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act. The design of the statute persuades us that Congress
intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards.

The principal indication that Congress intended to pre-empt state law is § 18(b)'s statement that a State "shall" submit a plan if it wishes to "assume responsibility" for "development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated." The unavoidable implication of this provision is that a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval, and petitioner concedes that § 18(b) would require an approved plan if Illinois wanted to "assume responsibility" for the regulation of occupational safety and health within the State. Petitioner contends, however, that an approved plan is necessary only if the State wishes completely to replace the federal regulations, not merely to supplement them. She argues that the correct interpretation of § 18(b) is that posited by Judge Easterbrook below: i.e., a State may either "oust" the federal standard by submitting a state plan to the Secretary for approval or "add to" the federal standard without seeking the Secretary's approval. 918 F.2d at 685.

Petitioner's interpretation of § 18(b) might be plausible were we to interpret that provision in isolation, but it simply is not tenable in light of the OSH Act's surrounding provisions. "We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." Dedeaux, 481 U.S. at 51 (internal quotation marks and citations omitted). The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation; a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.

We cannot accept petitioner's argument that the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. In determining whether state law "stands as an obstacle" to the full implementation of a federal law, Hines v. Davidowitz, 312 U.S. at 67, "it is not enough to say that the ultimate goal of both federal and state law" is the same, International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987). "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal." Ibid.; see also Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 477 (1984) (state statute establishing association to represent agricultural producers pre-empted even though it and the federal Agricultural Fair Practices Act "share the goal of augmenting the producer's bargaining power"). The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so. If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor, as described in § 18 of the Act.

III

Petitioner next argues that, even if Congress intended to pre-empt all nonapproved state occupational safety and health regulations whenever a federal standard is in effect, the OSH Act's pre-emptive
effect should not be extended to state laws that address public safety as well as occupational safety concerns. As we explained in Part II, we understand § 18(b) to mean that the OSH Act pre-empts all state "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated." 29 U.S.C. § 667(b). We now consider whether a dual impact law can be an "occupational safety and health standard" subject to pre-emption under the Act.

The OSH Act defines an "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Any state law requirement designed to promote health and safety in the workplace falls neatly within the Act's definition of an "occupational safety and health standard." Clearly, under this definition, a state law that expressly declares a legislative purpose of regulating occupational health and safety would, in the absence of an approved state plan, be pre-empted by an OSHA standard regulating the same subject matter. But petitioner asserts that if the state legislature articulates a purpose other than (or in addition to) workplace health and safety, then the OSH Act loses its pre-emptive force. We disagree.

Although "part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law's actual effect." English v. General Electric Co., 496 U.S. 72, 84 (1990) (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 212-213 (1983)). In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law. As we explained over two decades ago: "We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective – that would be tangentially furthered by the proposed state law. . . . Any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." Perez v. Campbell, 402 U.S. at 651-652. See also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 141-142 (focus on "whether the purposes of the two laws are parallel or divergent" tends to "obscure more than aid" in determining whether state law is pre-empted by federal law) (emphasis deleted); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) ("When considering the purpose of a challenged statute, this Court is not bound by 'the name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law") (quoting Lacoste v. Department of Conservation of Louisiana, 263 U.S. 545, 550 (1924)); Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 612 (1926) (pre-emption analysis turns not on whether federal and state laws "are aimed at distinct and different evils" but whether they "operate upon the same object").

Our precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one. As the Court of Appeals
observed, "it would defeat the purpose of section 18 if a state could enact measures stricter than OSHA's and largely accomplished through regulation of worker health and safety simply by asserting a non-occupational purpose for the legislation." 918 F.2d at 679. Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field. The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted under the Act.

IV

We recognize that "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensees and regulating the practice of professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975); see also Ferguson v. Skrupa, 372 U.S. 726, 731 (1963); Dent v. West Virginia, 129 U.S. 114, 122 (1889). But under the Supremacy Clause, from which our pre-emption doctrine is derived, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Felder v. Casey, 487 U.S. at 138 (quoting Free v. Bland, 369 U.S. 663, 666 (1962)); see also De Canas v. Bica, 424 U.S. 351, 357 (1976) ("Even state regulation designed to protect vital state interests must give way to paramount federal legislation"). We therefore reject petitioner's argument that the State's interest in licensing various occupations can save from OSH Act pre-emption those provisions that directly and substantially affect workplace safety.

We also reject petitioner's argument that the Illinois licensing acts do not regulate occupational safety and health at all, but are instead a "pre-condition" to employment. By that reasoning, the OSHA regulations themselves would not be considered occupational standards. SARA, however, makes clear that the training of employees engaged in hazardous waste operations is an occupational safety and health issue, and that certification requirements before an employee may engage in such work are occupational safety and health standards. See 505 U.S. at 92. Because neither of the OSH Act's saving provisions are implicated, and because Illinois does not have an approved state plan under § 18(b), the state licensing acts are pre-empted by the OSH Act to the extent they establish occupational safety and health standards for training those who work with hazardous wastes. Like the Court of Appeals, we do not specifically consider which of the licensing acts' provisions will stand or fall under the pre-emption analysis set forth above.

The judgment of the Court of Appeals is hereby affirmed.

Justice KENNEDY, concurring in part and concurring in the judgment.

Though I concur in the Court's judgment and with the ultimate conclusion that the state law is pre-empted, I would find express pre-emption from the terms of the federal statute. I cannot agree that we should denominate this case as one of implied pre-emption. The contrary view of the plurality is based on an undue expansion of our implied pre-emption jurisprudence which, in my view, is neither wise nor necessary.
As both the majority and dissent acknowledge, we have identified three circumstances in which a federal statute pre-empts state law: First, Congress can adopt express language defining the existence and scope of pre-emption. Second, state law is pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. And third, "state law is pre-empted to the extent that it actually conflicts with federal law." English v. General Electric Co., 496 U.S. 72, 78-79 (1990). This third form of pre-emption, so-called actual conflict pre-emption, occurs either "where it is impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English, 496 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The plurality would hold today that state occupational safety and health standards regulating an issue on which a federal standard exists conflict with Congress' purpose to "subject employers and employees to only one set of regulations." This is not an application of our pre-emption standards, it is but a conclusory statement of pre-emption, as it assumes that Congress intended exclusive federal jurisdiction. I do not see how such a mode of analysis advances our consideration of the case.

Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable . . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); see also English, 496 U.S. at 90 ("The 'teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists'") (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960)); Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 222-223 (1983). In my view, this type of pre-emption should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation.

The plurality's broad view of actual conflict pre-emption is contrary to two basic principles of our pre-emption jurisprudence. First, we begin "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Second, "the purpose of Congress is the ultimate touchstone" in all pre-emption cases. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)). A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.

Nonetheless, I agree with the Court that "the OSH Act pre-empts all state 'occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'" I believe, however, that this result is mandated by the express terms of § 18(b) of the OSH Act. It follows from this that the pre-emptive scope of the Act is also limited to the language of the statute. When the existence of pre-emption is evident from the statutory text, our inquiry must begin and end with the statutory framework itself.
As the plurality's analysis amply demonstrates, Congress has addressed the issue of pre-emption in the OSH Act. The dissent's position that the Act does not pre-empt supplementary state regulation becomes most implausible when the language of § 18(b) is considered in conjunction with the other provisions of § 18. Section 18(b) provides as follows: "Any State which . . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan . . . ." 29 U. S. C. § 667(b) (emphasis added).

The statute is clear: When a State desires to assume responsibility for an occupational safety and health issue already addressed by the Federal Government, it must submit a state plan. The most reasonable inference from this language is that when a State does not submit and secure approval of a state plan, it may not enforce occupational safety and health standards in that area.

In this regard I disagree with the dissent, and find unconvicing its conclusion that Congress intended to allow concurrent state and federal jurisdiction over occupational safety and health issues. The dissent would give the States, rather than the Federal Government, the power to decide whether as to any particular occupational safety and health issue there will exist a single or dual regulatory scheme. Under this theory the State may choose exclusive federal jurisdiction by not regulating; or exclusive state jurisdiction by submitting a state plan; or dual regulation by adopting supplementary rules, as Illinois did here. That position undermines the authority of OSHA in many respects. For example, § 18(c)(2) of the OSH Act allows OSHA to disapprove state plans which "unduly burden interstate commerce." The dissent would eviscerate this important administrative mechanism by allowing the States to sidestep OSHA's authority through the mechanism of supplementary regulation. Furthermore, concurrent state and federal jurisdiction might interfere with the enforcement of the federal regulations without creating a situation where compliance with both schemes is a physical impossibility, which the dissent would require for pre-emption. I would not attribute to Congress the intent to create such a hodgepodge scheme of authority. My views in this regard are confirmed by the fact that OSHA has as a consistent matter, since the enactment of the OSH Act, viewed § 18 as providing it with exclusive jurisdiction in areas where it issues a standard. 29 CFR § 1901.2 (1991); 36 Fed. Reg. 7006 (1971); Brief for United States as *Amicus Curiae* 12-21. Therefore, while the dissent may be correct that as a theoretical matter the separate provisions of § 18 may be reconciled with allowing concurrent jurisdiction, it is neither a natural nor a sound reading of the statutory scheme.

Justice SOUTER, with whom Justice BLACKMUN, Justice STEVENS, and Justice THOMAS join, dissenting.

The Court holds today that § 18 of the Occupational Safety and Health Act of 1970 (Act), 29 U. S.C. § 667, pre-empts state regulation of any occupational safety or health issue as to which there is a federal standard, whether or not the state regulation conflicts with the federal standard in the sense that enforcement of one would preclude application of the other. With respect, I dissent. In light of our rule that federal pre-emption of state law is only to be found in a clear congressional purpose to supplant exercises of the States' traditional police powers, the text of the Act fails to support the Court's conclusion.
Our cases recognize federal pre-emption of state law in three variants: express pre-emption, field pre-emption, and conflict pre-emption. Express pre-emption requires "explicit pre-emptive language." See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 203 (1983), citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law. 461 U.S. at 204. Finally, there is conflict pre-emption in either of two senses. The first is found when compliance with both state and federal law is impossible, ibid., the second when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The plurality today finds pre-emption of this last sort, discerning a conflict between any state legislation on a given issue as to which a federal standard is in effect, and a congressional purpose "to subject employers and employees to only one set of regulations." Thus, under the plurality's reading, any regulation on an issue as to which a federal standard has been promulgated has been pre-empted. As one commentator has observed, this kind of purpose-conflict pre-emption, which occurs when state law is held to "undermine a congressional decision in favor of national uniformity of standards," presents "a situation similar in practical effect to that of federal occupation of a field." L. Tribe, American Constitutional Law 486 (2d ed. 1988). Still, whether the pre-emption at issue is described as occupation of each narrow field in which a federal standard has been promulgated, as pre-emption of those regulations that conflict with the federal objective of single regulation, or, as Justice Kennedy describes it, as express pre-emption, the key is congressional intent, and I find the language of the statute insufficient to demonstrate an intent to pre-empt state law in this way.

Analysis begins with the presumption that "Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States," see, e.g., U.S. Const., Art. I, § 10; Patapsco Guano Co. v. North Carolina, 171 U.S. 345, 358 (1898), "we 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." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This assumption provides assurance that the "federal-state balance," United States v. Bass, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably ... ordained," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." Jones, 430 U.S. at 525. Subject to this principle, the enquiry into the possibly pre-emptive effect of federal legislation is an exercise of statutory construction. If the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.

At first blush, respondent's strongest argument might seem to rest on § 18(a) of the Act, 29 U. S. C. § 667(a), the full text of which is this:
"(a) Assertion of State standards in absence of applicable Federal standards

"Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."

That is to say, where there is no federal standard in effect, there is no pre-emption. The plurality reasons that there must be pre-emption, however, when there is a federal standard in effect, else § 18(a) would be rendered superfluous because "there is no possibility of conflict where there is no federal regulation." Ante, 505 U.S. at 100.

The plurality errs doubly. First, its premise is incorrect. In the sense in which the plurality uses the term, there is the possibility of "conflict" even absent federal regulation since the mere enactment of a federal law like the Act may amount to an occupation of an entire field, preventing state regulation. Second, the necessary implication of § 18(a) is not that every federal regulation pre-empts all state law on the issue in question, but only that some federal regulations may pre-empt some state law. The plurality ignores the possibility that the provision simply rules out field pre-emption and is otherwise entirely compatible with the possibility that pre-emption will occur only when actual conflict between a federal regulation and a state rule renders compliance with both impossible. Indeed, if Congress had meant to say that any state rule should be pre-empted if it deals with an issue as to which there is a federal regulation in effect, the text of subsection (a) would have been a very inept way of trying to make the point. It was not, however, an inept way to make the different point that Congress intended no field pre-emption of the sphere of health and safety subject to regulation, but not necessarily regulated, under the Act. Unlike the case where field pre-emption occurs, the provision tells us, absence of a federal standard leaves a State free to do as it will on the issue. Beyond this, subsection (a) does not necessarily mean anything, and the provision is perfectly consistent with the conclusion that as long as compliance with both a federal standard and a state regulation is not physically impossible, see Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), each standard shall be enforceable. If, indeed, the presumption against pre-emption means anything, § 18(a) must be read in just this way.

Respondent also relies on § 18(b), 29 U. S. C. § 667(b):

"(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

"Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement."
Respondent argues that the necessary implication of this provision is clear: the only way that a state rule on a particular occupational safety and health issue may be enforced once a federal standard on the issue is also in place is by incorporating the state rule in a plan approved by the Secretary.

As both the plurality and Justice Kennedy acknowledge, however, that is not the necessary implication of § 18(b). See ante, 505 U.S. at 99 (plurality opinion); ante, 505 U.S. at 112-113 (opinion concurring in part and concurring in judgment). The subsection simply does not say that unless a plan is approved, state law on an issue is pre-empted by the promulgation of a federal standard. In fact it tugs the other way, and in actually providing a mechanism for a State to "assume responsibility" for an issue with respect to which a federal standard has been promulgated (that is, to pre-empt federal law), § 18(b) is far from pre-emptive of anything adopted by the States. Its heading, enacted as part of the statute and properly considered under our canons of construction for whatever light it may shed, see, e.g., Strathearn S. S. Co. v. Dillon, 252 U.S. 348, 354 (1920); FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959), speaks expressly of the "development and enforcement of State standards to preempt applicable Federal standards." The provision does not in any way provide that absent such state pre-emption of federal rules, the State may not even supplement the federal standards with consistent regulations of its own. Once again, nothing in the provision's language speaks one way or the other to the question whether promulgation of a federal standard pre-empts state regulation, or whether, in the absence of a plan, consistent federal and state regulations may coexist. The provision thus makes perfect sense on the assumption that a dual regulatory scheme is permissible but subject to state pre-emption if the State wishes to shoulder enough of the federal mandate to gain approval of a plan.

Nor does the provision setting out conditions for the Secretary's approval of a plan indicate that a state regulation on an issue federally addressed is never enforceable unless incorporated in a plan so approved. Subsection (c)(2) requires the Secretary to approve a plan when in her judgment, among other things, it will not "unduly burden interstate commerce." 29 U.S.C. § 667(c)(2). Respondent argues, and the plurality concludes, that if state regulations were not pre-empted, this provision would somehow suggest that States acting independently could enforce regulations that did burden interstate commerce unduly. But this simply does not follow. The subsection puts a limit on the Secretary's authority to approve a plan that burdens interstate commerce, thus capping the discretion that might otherwise have been read into the congressional delegation of authority to the Secretary to approve state plans. From this restriction applying only to the Secretary's federal authority it is clearly a non sequitur to conclude that pre-emption must have been intended to avoid the equally objectionable undue burden that independent state regulation might otherwise impose. Quite the contrary; the dormant Commerce Clause can take care of that, without any need to assume pre-emption.

The final provision that arguably suggests pre-emption merely by promulgation of a federal standard is § 18(h), 29 U. S. C. § 667(h):

"(h) Temporary enforcement of State standards"
"The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier."

This provision of course expired in 1972, but its language may suggest something about the way Congress understood the rest of § 18. Since, all are agreed, a State would not have had reason to file a plan unless a federal standard was in place, § 18(h) necessarily refers to a situation in which there is a federal standard. Respondent argues that the provision for agreements authorizing continued enforcement of a state standard following adoption of a federal standard on the issue it addresses implies that, absent such agreement, a State would have been barred from enforcing any standard of its own.

Once again, however, that is not the necessary implication of the text. A purely permissive provision for enforcement of state regulations does not imply that all state regulations are otherwise unenforceable. All it necessarily means is that the Secretary could agree to permit the State for a limited time to enforce whatever state regulations would otherwise have been pre-empted, as would have been true when they actually so conflicted with the federal standard that an employer could not comply with them and still comply with federal law as well. Thus, in the case of a State wishing to submit a plan, the provision as I read it would have allowed for the possibility of just one transition, from the pre-Act state law to the post-Act state plan. Read as the Court reads it, however, employers and employees in such a State would have been subjected first to state law on a given issue; then, after promulgation of a federal standard, to that standard; and then, after approval of the plan, to a new state regime. One enforced readjustment would have been better than two, and the statute is better read accordingly.

Regarding the first cross-current in preemption cases – differing views on how to determine congressional intent, particularly the extent to which legislative history can be used to make that determination – Justice Thomas, joined by Justice Scalia, concurring in the judgment in part and dissenting in part, cautioned in Bates v. Dow Agrosciences LLC. against any broad use of legislative history. He stated, “The majority notes that Congress must have intended to preserve common-law suits, because the legislative history does not indicate that Congress meant to abrogate such suits. For the Court, then, enacting a pre-emption provision is not enough. Either Congress must speak with added specificity in the statute (to avoid the presumption against pre-emption) or some individuals Members of Congress or congressional committees must display their preference

Id. at 455-59.

See, e.g., Mutual Pharmaceutical Co. v. Bartlett, 133 S. Ct. 2466 (2013) (design defect claim, based on generic drug manufacturer’s failure to strengthen warnings on drug label preempted by federal law that expressly prohibits manufacturers of generic drugs from making any unilateral changes to drug’s label). Id. at 2480-82 (Breyer, J., joined by Kagan, J., dissenting); id. at 2482-84 (Sotomayor, J., joined by Ginsburg, J., dissenting) (state law at issue merely “supplements” or “complements” the federal scheme, and does not conflict with it.); PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2572 (2011) (generic drug maker’s duty of “sameness” under federal law, mandating the use of warning labels that are identical to its name-brand counterparts, made it impossible for drug manufacturers to enhance warnings to comply with state tort law. Thus, state tort law inadequate warning label claims were preempted.); id. at 2582 (Sotomayor, J., joined by Ginsburg, Breyer & Kagan, JJ., dissenting). The result of the majority’s opinions in these two cases is that drug labels which the initial manufacturer comes to know are faulty can continue to be sold under a generic equivalent without change, and affected individuals have no legal recourse, since the generic makers are not liable in any way under PLIVA, Inc. and Bartlett, and the original manufacturer is not be liable because they would not have sold the drug to the affected individual. See also AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (Federal Arbitration Act preempts California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); id. at 1756 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting); Bruesewitz v. Wyeth, 131 S. Ct. 1068, 1082 (2011) (National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects); id. at 1086 (Sotomayor, J., joined by Ginsburg, J., dissenting); id. at 1082 (Justice Kagan took no part in the consideration or decision of the case); 23-34 94th St. Grocery Corp. v. New York City Board of Health, 685 F.3d 174 (2nd Cir. 2012) (New York City health code requiring all tobacco retailers to display signs bearing graphic anti-smoking images preempted by Federal Cigarette Labeling and Advertising Act).

Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008) (federal Labeling Act neither expressly nor impliedly preempts a state statutory claim against a cigarette manufacturer based on the ground

Reflecting the impact of the cross-currents caused by the conservative predisposition to defer to states, but also to be skeptical of business regulations versus the liberal predisposition to defer to the federal government, but also be supportive of business regulation, a number of recent preemption cases have favored business interests, while state regulations on business supplementing federal regulation have sometimes survived the Court’s express and implied preemption analysis.
In the field of immigration regulation, a 5-3 Court held in *Arizona v. United States* that Arizona was preempted by federal immigration law from enacting provisions making the failure to comply with federal alien-registration requirements a state misdemeanor, making it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona, and a provision authorizing state arrests for any individual if the officer has probable cause to believe the individual has committed some other offense that would make the individual removable from the United States. In contrast, a provision requiring officers conducting stops, detentions, or arrests to verify a person's immigration status with the federal government if the officer has a reasonable suspicion that the person was unlawfully in the United States was not facially preempted, since it could be applied consistent with federal immigration law. However, the Court warned the provision could be challenged on an as-applied basis if the stops resulted in prolonged detention or otherwise were done inconsistent with federal policy, such as if done on a racially discriminatory basis. Three Justices dissented.

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21 132 U.S. 2492, 2501-10 (2012). Justice Kagan took no part in the consideration or decision of the case. *Id.* at 2521.

22 *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part) (all provisions not preempted); *id.* at 2523 (Thomas, J., concurring in part and dissenting in part) (all provisions not preempted); *id.* at 2524-25 (Alito, J., concurring in part and dissenting in part) (all provisions not preempted, except state misdemeanor for failure to comply with federal alien-registration requirements, which is preempted). See also *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (Arizona requirement that applicants registering to vote using the federal voter registration form provide independent proof of their citizenship was preempted by the National Voter Registration Act’s mandate that states “accept and use” the federal form and its requirement that applicants only need to aver, under penalty of perjury, that they are citizen); *id.* at 2261 (Thomas, J., dissenting); *id.* at 2270 (Alito, J., dissenting). On the issue of state laws touching upon immigration matters, see also *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (similar Alabama provisions to those in Arizona preempted; similar provision to Arizona law regarding verifying a person’s immigration status not preempted); Georgia Latino Alliance for Human Rights
In *Crosby v. National Foreign Trade Council*, the Court held that a state law imposing penalties on United States or foreign companies doing business in Myanmar, formerly known as Burma, undermined the president’s ability to conduct foreign policy and were preempted by Congress, which has passed legislation to punish Myanmar. For the Court, Justice Souter said, “It is simply implausible that Congress would have gone to such lengths to empower the president if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary presidential action.”

§ 13.3 The Dormant Commerce Clause Doctrine

1. The Evolution of Standards for Dormant Commerce Clause Review

Dormant commerce clause review is not based upon any literal text in the Constitution. Nor is it based on the express purpose of the Commerce Clause, which is merely to grant commerce power to Congress. Rather, it is based on the Court’s view of an implied, or silent, purpose behind the Commerce Clause. That implied purpose is to ensure that the basic purpose of the Commerce Clause, identified as far back as *Gibbons v. Ogden* as ensuring national economic solutions to national economic problems, is not frustrated by state or local parochial legislation. The doctrine has developed in common-law fashion, and its contours have shifted with each succeeding Court era.

A. The Original Natural Law Era: 1789-1873

During the original natural law era, the Court was faced more with defining federal and state constitutional power to regulate, as discussed in 1824 in *Gibbons v. Ogden*, excerpted at § 5.4, rather than the interplay between federal and state power when both have the power to regulate. The Taney Court held in 1837 that the power of the state to regulate derives from the state’s own police powers, not from a delegated grant of power from the Commerce Clause.

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23 *v. Deal*, 691 F.3d 1250 (11th Cir. 2012) (same, with respect to Georgia law); Villas at Parkside Partners v. Farmers Branch, Texas, 675 F.3d 802 (5th Cir. 2012) (local occupancy restriction requiring rental tenants to be in the country lawfully is an immigration law posing as a housing regulation, and is preempted), *aff’d*, 726 F.3d 524 (5th Cir. 2013) (9-6 *en banc*), *cert. denied*, 134 S. Ct. 1491 (2014). *But see* Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) (local occupancy regulation barring renting to illegal aliens not preempted), *cert. denied*, 134 S. Ct. 2140 (2014).


In 1856, the Taney Court noted in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,\(^26\) that while the Court will make an initial determination in dormant commerce clause cases whether a particular state statute impermissibly burdens commerce, Congress is the ultimate decisionmaker on whether a conflict exists between state and federal law. Thus, where Congress has constitutional power to regulate under the Commerce Clause, Congress can consent to any state regulation of commerce it wishes, as addressed at § 13.4.1, and, as stated in Article I, § 10, cl. 3, with the consent of Congress, any state can enter into an interstate “Agreement or Compact” with other states. If Congress has consented, no dormant commerce clause challenge can be brought. As with preemption doctrine, this means that, strictly speaking, dormant commerce clause analysis is not ultimately constitutionally determined, but rather a matter of congressional intent.

Despite this fact, in *Cooley v. Board of Wardens*,\(^27\) decided five years earlier in 1851, Justice Curtis had said, “When it is said that the nature of a power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress.” Some subjects, he added, require a single uniform rule. Others require local diversity. By this language, the Court seemed to claim the power in *Cooley* to identify subjects as exclusively for federal or state law-making. Building on the *Cooley* theory that some subjects are exclusively for Congress, the Court held in 1869 in *Woodruff v. Parham*\(^28\) that a state may not regulate commerce purely external to the state, nor impose a discriminatory tax on an article brought into it from another state.

### B. The Formalist Era: 1873-1937

The formalist-era Court continued occasionally to apply the *Cooley* doctrine. For example, in 1877 in *Hannibal v. Husen*,\(^29\) the Court held that it was unconstitutional for Missouri to bar the import of all Texas, Mexican, or Indian cattle from March to November, without regard to whether there was any possibility of the cattle being diseased, despite the state’s concern that some of these cattle may have the “Spanish or Texas fever.” Similarly, in 1886 in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*,\(^30\) the Court held unconstitutional under the *Cooley* doctrine an Illinois railroad regulation as interfering with the exclusive power of Congress to regulate interstate railroad commerce.


\(^{27}\) 53 U.S. (12 How.) 299, 319 (1851).

\(^{28}\) 75 U.S. (8 Wall.) 123, 138-40 (1869).

\(^{29}\) 95 U.S. 465, 469-74 (1877). *But see* Mintz v. Baldwin, 289 U.S. 346, 349-52 (1933) (state was allowed to require imported cattle to be from a herd certified free of Bang's disease).

\(^{30}\) 118 U.S. 557, 575-77 (1886).
Since 1937, the Court has not relied upon Cooley, but has phrased dormant commerce clause analysis as ultimately a matter of congressional intent. Towards the end of the formalist era, the Court held in 1936 in Baldwin v. Seelig\textsuperscript{31} that the Commerce Clause bars state laws whose purpose and effect is to suppress the consequences of competition between states, with Justice Cardozo saying, "The peoples of the several states must sink or swim together."

C. The Holmesian Era: 1937-1954

As the Court did with many doctrines at the beginning of the Holmesian era in 1937, the Court adopted a functional test that depended upon the impact of the state regulation on the free flow of commerce. Building on Baldwin v. Seelig, the underlying theory behind dormant commerce clause review was phrased in 1946 in Freeman v. Hewit as follows: “The very purpose of the Commerce Clause was to create an area of free trade among the several states. . . . It is now established beyond dispute that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.”\textsuperscript{32} The Court reached a similar result in 1949 when New York, to protect its local economy, refused to license the sale of milk destined for export. In H.P. Hood & Sons, Inc. v. Du Mond, Justice Jackson said: “Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs or duties or regulations exclude them.”\textsuperscript{33}

In general, conservative Justices tend to give greater emphasis to deferring to state governments; more liberal Justices tend to defer to the federal government, as noted at § 8.1.1(E) n.30. Thus, among Holmesian Justices on the Court since 1945, it has tended to be the more conservative Holmesian Justices, like Chief Justice Rehnquist, who have more often supported state attempts at regulation, while more liberal Holmesian Justices, like Justice White, have more often found the state regulations invalid as too great burdens on interstate commerce.\textsuperscript{34}


\textsuperscript{33} 336 U.S. 525, 539 (1949).

D. The Instrumentalist Era: 1954-1986

The instrumentalist-era Court between 1954 and 1986 continued a rigorous approach towards dormant commerce clause review. For example, in *Bibb v. Navajo*, the Court invalidated an Illinois ban on straight mudflaps, which were held to have inconclusive safety benefits while being inconsistent with laws in 45 other states. In *Kassel v. Consolidated Freightways Corp.*, the Court struck down Iowa's ban on 65-foot double semis on the similar ground that it too greatly interfered with the interstate trucking industry with no clear overall safety benefits.

The Court has noted that there are four kinds of dormant commerce clause cases: (1) the state legislation burdens interstate commerce on its face; (2) the state legislation is the product of a purpose to discriminate against interstate commerce; (3) the state legislation has a discriminatory effect on interstate commerce; and (4) the state regulates in-state and out-of-state commerce even-handedly and only involves an incidental effect on interstate commerce. In the first three of these cases, the Court has stated that the burden is on the state to justify its regulation. For state regulation that burdens interstate commerce on its face, the Court places the burden on the state to establish the validity of the enactment, as in *Maine v. Taylor*. In *Minnesota v. Clover Leaf Creamery Co.*, the Court stated that the same standard applies if the state law has either a discriminatory purpose or effect. With regard to the fourth kind of case, the Court held in *Pike v. Bruce Church, Inc.*:

If a state statute has only indirect effects on interstate commerce and regulates evenhandedly, the dormant Commerce Clause is violated only if plaintiff shows that the burden on interstate commerce is clearly excessive in relation to local interests. When making that determination, the Court considers the nature of the local interest and whether it could be promoted as well by laws having a lesser impact on interstate activities.

Under the language of the instrumentalist-era cases, the *Pike v. Bruce Church* test and the *Maine v. Taylor* test are basically the same, with only the burden shifting. Each focuses on: (1) the state’s

sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism . . . ”).  


legitimate, non-protectionist interest; (2) whether the state’s interest could be promoted as well by less discriminatory alternatives; and (3) given these two considerations whether the burden on interstate commerce caused by the state regulation is clearly excessive. As the Court has stated, “In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.”\(^{40}\) In practice, however, the instrumentalist Court stated that there is “a virtual \textit{per se} rule of invalidity” for state legislation facially discriminating against interstate commerce or involving a discriminatory purpose or effect.\(^{41}\)

As the “virtual \textit{per se}” language suggests, it can prove very difficult for the state to meet its burden in cases of discriminatory legislation. For example, in 1978, in \textit{Philadelphia v. New Jersey},\(^ {42}\) the Court said that New Jersey was being "protectionist" when it barred import of waste because it was running out of landfill space. There a state-authorized ban on accepting out-of-state waste discriminated on its face against interstate commerce, so the state had the burden of proving that it furthered health and safety concerns which could not adequately be served by nondiscriminatory alternatives. The Court said that the state had not met this burden because it provided no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the state, but not the amount the operator may accept from inside the state. An overall limit on waste would have met the concern with landfill space and would not have been discriminatory.

In 1979, the same rigorous approach to facial discrimination was applied in \textit{Hughes v. Oklahoma}.\(^ {43}\) In \textit{Hughes}, the Court invalidated a state ban on export of minnows seized within the state, ostensibly an environmental concern with ensuring sufficient minnows remained to repopulate the species. Justice Brennan explained that the state had chosen the most discriminatory means without showing that nondiscriminatory methods, such as an overall ban on minnows seized from state rivers in any one year, were unfeasible. In 1982, in \textit{New England Power Co. v. New Hampshire},\(^ {44}\) a ban on export of electricity generated within a state was struck down as "simple economic protectionism."

However, a ban on export of ground water was sustained in \textit{Sporhase v. Nebraska}.\(^ {45}\) The Court said that the state was not discriminating since it also controlled intrastate transfer of water. Using the \textit{Pike} balancing test, the Court said that the burden on interstate commerce was not excessive.


\(^{42}\) 437 U.S. 617 (1978).

\(^{43}\) 441 U.S. 322 (1979).

\(^{44}\) 455 U.S. 331 (1982).

because: (1) the state was taking reasonable measures to protect a vital resource in a time of shortage, (2) its purpose was protecting health, (3) some precedents recognized state power to restrict transfer of water, (4) a state's claim to ownership of groundwater might support a limited preference to its own citizens, and (5) where a conservation program is in place, groundwater is something like the state-produced cement in Reeves, that case discussed at § 13.4.2 n.58.

The instrumentalist Court has noted that even under the Pike test for even-handed state regulations the courts determine for themselves the extent of the legislature’s legitimate purposes, and whether the means adopted reflect a “clearly excessive” burden on interstate commerce. Thus, the courts do not defer to rational basis judgments of the legislature, as they defer to Congress in Commerce Clause cases, noted at § 6.3 nn.25-27, perhaps because of a greater willingness to trust that Congress is regulating in the national interest. In Dormant Commerce Clause cases, the district court will hear the evidence concerning the state’s alleged legitimate interest, as well as evidence concerning the burden on interstate commerce, and then will balance the extent of the state’s benefits against the degree of interference with interstate commerce. As a factual decision made by the district court, this conclusion will be entitled to deference on appeal, and subject to being reversed on only if it is “clearly erroneous.”

2. The Modern Standards for Dormant Commerce Clause Review

Since 1986, the Court has continued to follow the Holmesian and instrumentalist-era dormant commerce clause doctrine. The Court uses the tests stated in Pike v. Bruce Church, excerpted at § 13.3.4, and Maine v. Taylor, excerpted at § 13.3.3, holding that a state law that discriminates against interstate commerce must be justified by the state showing that the law satisfies the higher Taylor standard of (1) serving a legitimate local interest, unrelated to economic protectionism, whose (2) legitimate interest could not be adequately served by reasonable nondiscriminatory alternatives.


47 See, e.g., Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669-71 (1981). Reflecting their predisposition to favor states, conservative Holmesian Justices Stewart and Rehnquist, along with conservative formalist Chief Justice Burger, dissented from this conclusion in Kassel, stating that if a traffic safety law is not merely a pretext for discrimination the Court should ask only whether it is rational. Id. at 691-93 (Rehnquist, J., joined by Burger, C.J., and Stewart, J., dissenting). The rest of the Court, however, rejected this view.

48 See id. at 670-71.


In many cases, the state fails one of these two considerations, and thus the Court does not address the additional issue of whether the law nonetheless represents (3) a “clearly excessive” burden under Pike. Since the Taylor test is phrased as a more rigorous version of Pike, this third requirement logically must be present in both Pike and Taylor kinds of cases. Of course, as addressed at § 13.4.1, federal law, if "unmistakably clear," can sanction state laws that burden interstate commerce in ways the Court would otherwise hold invalid because dormant commerce clause review, like preemption, is ultimately a matter of deciphering congressional intent.

3. Review of Laws that Discriminate Against Interstate Commerce

Dean Milk v. City of Madison
340 U.S. 349 (1951)

Justice CLARK delivered the opinion of the Court.

This appeal challenges the constitutional validity of two sections of an ordinance of the City of Madison, Wisconsin, regulating the sale of milk and milk products within the municipality's jurisdiction. One section in issue makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Another section, which prohibits the sale of milk, or the importation, receipt or storage of milk for sale, in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials, is attacked insofar as it expressly relieves municipal authorities from any duty to inspect farms located beyond twenty-five miles from . . . the city.

Appellant is an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin. It contended below, as it does here, that both the five-mile limit on pasteurization plants and the twenty-five-mile limit on sources of milk violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution. The Supreme Court of Wisconsin upheld the five-mile limit on pasteurization. As to the twenty-five-mile limitation the court ordered the complaint dismissed for want of a justiciable controversy. 43 N. W. 2d 480 (1950). This appeal, contesting both rulings, invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (2).

The City of Madison is the county seat of Dane County. Within the county are some 5,600 dairy farms with total raw milk production in excess of 600,000,000 pounds annually and more than ten

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51 See generally Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 891-95 (1988). For further discussion of why the Taylor test is better viewed as a higher version of the Pike test, with the burden of proof shifted to the state, rather than a separate test, akin to “strict scrutiny,” such as is applied under the Equal Protection Clause, see Charles D. Kelso & R. Randall Kelso, THE PATH OF CONSTITUTIONAL LAW § 20.3.2.2 (2007) (http://libguides.stcl.edu/kelsonmaterials).

times the requirements of Madison. Aside from the milk supplied to Madison, fluid milk produced in the county moves in large quantities to Chicago and more distant consuming areas, and the remainder is used in making cheese, butter and other products. At the time of trial the Madison milkshed was not of "Grade A" quality by the standards recommended by the United States Public Health Service, and no milk labeled "Grade A" was distributed in Madison.

The area defined by the ordinance with respect to milk sources encompasses practically all of Dane County and includes some 500 farms which supply milk for Madison. Within the five-mile area for pasteurization are plants of five processors, only three of which are engaged in the general wholesale and retail trade in Madison. Inspection of these farms and plants is scheduled once every thirty days and is performed by two municipal inspectors, one of whom is full-time. The courts below found that the ordinance in question promotes convenient, economical and efficient plant inspection.

Appellant purchases and gathers milk from approximately 950 farms in northern Illinois and southern Wisconsin, none being within twenty-five miles of Madison. Its pasteurization plants are located at Chemung and Huntley, Illinois, about 65 and 85 miles respectively from Madison. Appellant was denied a license to sell its products within Madison solely because its pasteurization plants were more than five miles away.

It is conceded that the milk which appellant seeks to sell in Madison is supplied from farms and processed in plants licensed and inspected by public health authorities of Chicago, and is labeled "Grade A" under the Chicago ordinance which adopts the rating standards recommended by the United States Public Health Service. Both the Chicago and Madison ordinances, though not the sections of the latter here in issue, are largely patterned after the Model Milk Ordinance of the Public Health Service. However, Madison contends and we assume that in some particulars its ordinance is more rigorous than that of Chicago.

[T]his regulation, like the provision invalidated in *Baldwin v. Seelig, Inc.*, [294 U.S. 511 (1935)], in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. "The importer . . . may keep his milk or drink it, but sell it he may not." *Id.*, at 521. In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. [FN 4: It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same as that moving in interstate commerce.] This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them. Cf. *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211 (1944).

It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors. Cf. *Sprout v. City of South Bend*, 277 U.S. 163, 169 (1928); see *Miller v. Williams*, 12 F. Supp. 236, 242, 244 (D. Md. 1935). Moreover, appellee Health
Commissioner of Madison testified that as proponent of the local milk ordinance he had submitted the provisions here in controversy and an alternative proposal based on § 11 of the Model Milk Ordinance recommended by the United States Public Health Service. The model provision imposes no geographical limitation on location of milk sources and processing plants but excludes from the municipality milk not produced and pasteurized conformably to standards as high as those enforced by the receiving city. In implementing such an ordinance, the importing city obtains milk ratings based on uniform standards and established by health authorities in the jurisdiction where production and processing occur. The receiving city may determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milkshed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot checks the local ratings. The Commissioner testified that Madison consumers "would be safeguarded adequately" under either proposal and that he had expressed no preference. To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that "one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. Seelig, Inc., supra, at 527.

For these reasons we conclude that the judgment below sustaining the five-mile provision as to pasteurization must be reversed.

The Supreme Court of Wisconsin thought it unnecessary to pass upon the validity of the twenty-five-mile limitation, apparently in part for the reason that this issue was made academic by its decision upholding the five-mile section. In view of our conclusion as to the latter provision, a determination of appellant's contention as to the other section is now necessary. As to this issue, therefore, we vacate the judgment below and remand for further proceedings not inconsistent with the principles announced in this opinion.

Hunt v. Washington State Apple Advertising Commission
432 U.S. 333 (1977)

Chief Justice BURGER delivered the opinion of the Court.

In 1973, North Carolina enacted a statute which required, inter alia, all closed containers of apples sold, offered for sale, or shipped into the State to bear “no grade other than the applicable U.S. grade or standard.” N.C. Gen. Stat. § 106-189.1 (1973). In an action brought by the Washington State Apple Advertising Commission, a three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce.

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a
multimillion dollar enterprise which plays a significant role in Washington's economy. Because of
the importance of the apple industry to the State, its legislature has undertaken to protect and
enhance the reputation of Washington apples by establishing a stringent, mandatory inspection
program, administered by the State's Department of Agriculture, which requires all apples shipped
in interstate commerce to be tested under strict quality standards and graded accordingly. In all
cases, the Washington State grades, which have gained substantial acceptance in the trade, are the
equivalent of, or superior to, the comparable grades and standards adopted by the United States
Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the
State's growers approximately $1 million each year.

In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in
the 50 States, which in effect required all closed containers of apples shipped into or sold in the State
to display either the applicable USDA grade or none at all. State grades were expressly prohibited.
In addition to its obvious consequence prohibiting the display of Washington State apple grades on
containers of apples shipped into North Carolina, the regulation presented the Washington apply
industry with a marketing problem of potentially nationwide significance. Washington apple
growers annually ship in commerce approximately 40 million closed containers of apples, nearly
500,000 of which eventually find their way into North Carolina, stamped with the applicable
Washington State variety and grade. It is the industry's practice to purchase these containers
preprinted with the various apple varieties and grades, prior to harvest. After these containers are
filled with apples of the appropriate type and grade, a substantial portion of them are placed in
cold-storage warehouses where the grade labels identify the product and facilitate its handling.
These apples are then shipped as needed throughout the year; after February 1 of each year, they
constitute approximately two-thirds of all apples sold in fresh markets in this country. Since the
ultimate destination of these apples is unknown at the time they are placed in storage, compliance
with North Carolina's unique regulation would have required Washington growers to obliterate the
printed labels on containers shipped to North Carolina, thus giving their product a damaged
appearance. Alternatively, they could have changed their marketing practices to accommodate the
needs of the North Carolina market, i.e., repack apples to be shipped to North Carolina in containers
bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that
market in such special containers. As a last resort, they could discontinue the use of the preprinted
containers entirely. None of these costly and less efficient options was very attractive to the industry.
Moreover, in the event a number of other States followed North Carolina's lead, the resultant
inability to display the Washington grades could force the Washington growers to abandon the
State's expensive inspection and grading system which their customers had come to know and rely
on over the 60-odd years of its existence.

As the District Court correctly found, the challenged statute has the practical effect of not only
burdening interstate sales of Washington apples, but also discriminating against them. This
discrimination takes various forms. The first, and most obvious, is the statute's consequence of
raising the costs of doing business in the North Carolina market for Washington apple growers and
dealers, while leaving those of their North Carolina counterparts unaffected.
Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system.

Third, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-a-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would “want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed . . . .” App. 21 (emphasis added). Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. Dean Milk Co. v. Madison, 340 U.S. at 354. North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under no grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable
individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's, could not be demonstrated to be equal or superior to the corresponding USDA categories. Concededly, even in this latter instance, some potential for "confusion" might persist. However, it is the type of "confusion" that the national interest in the free flow of goods between the States demands be tolerated. [Ed.: That is, even if the statute did advance legitimate interests with no less discriminatory alternatives, it would still be invalid as an "clearly excessive" burden on "the free flow of goods" in interstate commerce.]

Maine v. Taylor
477 U.S. 131 (1986)

Justice BLACKMUN delivered the opinion of the Court.

Appellee Robert J. Taylor (hereafter Taylor or appellee) operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish, he arranged to have 158,000 live golden shiners delivered to him from outside the State. The shipment was intercepted, and a federal grand jury in the District of Maine indicted Taylor for violating and conspiring to violate the Lacey Act Amendments of 1981, 95 Stat. 1073, 16 U.S.C. §§ 3371-3378. Section 3(a)(2)(A) of those Amendments, 16 U.S.C. § 3372(a)(2)(A), makes it a federal crime "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."

The Commerce Clause of the Constitution grants Congress the power "[to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980). Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State's border. Still, as both the District Court and the Court of Appeals recognized, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." Id., at 36.
In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in Hughes v. Oklahoma, 441 U.S., at 336, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. See also, e.g., Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951)

The District Court and the Court of Appeals both reasoned correctly that, since Maine's import ban discriminates on its face against interstate trade, it should be subject to the strict requirements of Hughes v. Oklahoma, notwithstanding Maine's argument that those requirements were waived by the Lacey Act Amendments of 1981. It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769 (1945). But because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been "unmistakably clear." South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91 (1984). The 1981 Amendments of the Lacey Act clearly provide for federal enforcement of valid state and foreign wildlife laws, but Maine identifies nothing in the text or legislative history of the Amendments that suggests Congress wished to validate state laws that would be unconstitutional without federal approval.

Before this Court, Maine concedes that the Lacey Act Amendments do not exempt state wildlife legislation from scrutiny under the Commerce Clause. See Reply Brief for Appellant 3, n.2. The State insists, however, that the Amendments should lower the intensity of the scrutiny that would otherwise be applied. We do not agree. An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny. Absent "a clear expression of approval by Congress," any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases "the risk that unrepresented interests will be adversely affected by restraints on commerce." South-Central Timber, supra, at 92.

The District Court found after an evidentiary hearing that both parts of the Hughes test were satisfied, but the Court of Appeals disagreed. We conclude that the Court of Appeals erred in setting aside the findings of the District Court. To explain why, we need to discuss the proceedings below in some detail.
The evidentiary hearing on which the District Court based its conclusions was one before a Magistrate. Three scientific experts testified for the prosecution and one for the defense. The prosecution experts testified that live baitfish imported into the State posed two significant threats to Maine's unique and fragile fisheries. First, Maine's population of wild fish – including its own indigenous golden shiners – would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. See, e.g., App. 39-55. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways. See, e.g., id., at 59-70, 141-149.

The prosecution experts further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species. According to their testimony, the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species "a physical impossibility." Id., at 81. Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish. Id., at 81-82, 195. Although statistical sampling and inspection techniques had been developed for salmonids (i.e., salmon and trout), so that a shipment could be certified parasite-free based on a standardized examination of only some of the fish, no scientifically accepted procedures of this sort were available for baitfish. See, e.g., id., at 71, 184, 193-194.

Appellee's expert denied that any scientific justification supported Maine's total ban on the importation of baitfish. Id., at 241. He testified that none of the three parasites discussed by the prosecution witnesses posed any significant threat to fish in the wild, id., at 206-212, 228-232, and that sampling techniques had not been developed for baitfish precisely because there was no need for them. Id., at 265-266. He further testified that professional baitfish farmers raise their fish in ponds that have been freshly drained to ensure that no other species is inadvertently collected. Id., at 239-240.

Weighing all the testimony, the Magistrate concluded that both prongs of the Hughes test were satisfied, and accordingly that appellee's motion to dismiss the indictment should be denied. Appellee filed objections, but the District Court, after an independent review of the evidence, reached the same conclusions. First, the court found that Maine "clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish," because "substantial uncertainties" surrounded the effects that baitfish parasites would have on the State's unique population of wild fish, and the consequences of introducing nonnative species were similarly unpredictable. 585 F.Supp., at 397. Second, the court concluded that less discriminatory means of protecting against these threats were currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised. Id., at 398. Even if procedures of this sort could be effective, the court found that their development probably would take a considerable amount of time. Id., at 398, n.11.

Although the Court of Appeals did not expressly set aside the District Court's finding of a legitimate local purpose, it noted that several factors "cast doubt" on that finding. 752 F.2d, at 762. First, Maine was apparently the only State to bar all importation of live baitfish. See id., at 761. Second, Maine
accepted interstate shipments of other freshwater fish, subject to an inspection requirement. Third, "an aura of economic protectionism" surrounded statements made in 1981 by the Maine Department of Inland Fisheries and Wildlife in opposition to a proposal by appellee himself to repeal the ban. Ibid. Finally, the court noted that parasites and nonnative species could be transported into Maine in shipments of nonbaitfish, and that nothing prevented fish from simply swimming into the State from New Hampshire. Id., at 762, n.12.

Although the proffered justification for any local discrimination against interstate commerce must be subjected to "the strictest scrutiny," Hughes v. Oklahoma, 441 U.S., at 337, the empirical component of that scrutiny, like any other form of factfinding, "is the basic responsibility of district courts, rather than appellate courts," Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982), quoting DeMarco v. United States, 415 U.S. 449, 450, n. (1974). As this Court frequently has emphasized, appellate courts are not to decide factual questions de novo, reversing any findings they would have made differently. See, e.g., Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). The Federal Rules of Criminal Procedure contain no counterpart to Federal Rule of Civil Procedure 52(a), which expressly provides that findings of fact made by the trial judge "shall not be set aside unless clearly erroneous." But the considerations underlying Rule 52(a) – the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first-hand observation, all apply with full force in the criminal context, at least with respect to factual questions having nothing to do with guilt. Accordingly the "clearly erroneous" standard of review long has been applied to nonguilt findings of fact by district courts in criminal cases. See Campbell v. United States, 373 U.S. 487, 493 (1963); 2 C. Wright, Federal Practice and Procedure § 374 (2d ed. 1982). We need not decide now whether all such findings should be reviewed under the "clearly erroneous" standard, because appellee concedes that the standard applies to the factual findings made by the District Court in this case. See Tr. of Oral Arg. 27. We note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984); Pullman-Standard v. Swint, 456 U.S., at 287.

No matter how one describes the abstract issue whether “alternative means could promote this local purpose as well without discriminating against interstate commerce," Hughes v. Oklahoma, 441 U.S., at 336, the more specific question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish is one of fact, and the District Court's finding that such techniques have not been devised cannot be characterized as clearly erroneous. Indeed, the record probably could not support a contrary finding. Two prosecution witnesses testified to the lack of such procedures, and appellee's expert conceded the point, although he disagreed about the need for such tests. See App. 74-75, 184, 265-266. That Maine has allowed the importation of other freshwater fish after inspection hardly demonstrates that the District Court clearly erred in crediting the corroborated and uncontradicted expert testimony that standardized inspection techniques had not yet been developed for baitfish. This is particularly so because the text of the permit statute suggests that it was designed specifically to regulate importation of salmonids, for which, the experts testified, testing procedures had been developed.
The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935), it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently," Philadelphia v. New Jersey, 437 U.S., at 627. The judgment of the Court of Appeals setting aside appellee's conviction is therefore reversed.

Justice STEVENS, dissenting.

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally, sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

Like the District Court, the Court concludes that uncertainty about possible ecological effects from the possible presence of parasites and nonnative species in shipments of out-of-state shiners suffices to carry the State's burden of proving a legitimate public purpose. The Court similarly concludes that the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary. It seems clear, however, that the presumption should run the other way. Since the State engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure.

Significantly, the Court of Appeals, which is more familiar with Maine's natural resources and with its legislation than we are, was concerned by the uniqueness of Maine's ban. That court felt, as I do, that Maine's unquestionable natural splendor notwithstanding, the State has not carried its substantial burden of proving why it cannot meet its environmental concerns in the same manner as other States with the same interest in the health of their fish and ecology.

I respectfully dissent.
4. Laws That are Non-Discriminatory in Purpose or Effect

Pike v. Bruce Church, Inc.
397 U.S. 137 (1970)

Justice STEWART delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act.

A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must "be packed in regular compact arrangement in closed standard containers approved by the supervisor." Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional. A three-judge court was convened. 28 U.S.C. §§ 2281, 2284. After first granting temporary relief, the court issued a permanent injunction upon the ground that the challenged order constituted an unlawful burden upon interstate commerce. This appeal followed. 28 U.S.C. § 1253. 396 U.S. 812.

The facts are not in dispute, having been stipulated by the parties. The appellee company has for many years been engaged in the business of growing, harvesting, processing, and packing fruits and vegetables at numerous locations in Arizona and California for interstate shipment to markets throughout the Nation. One of the company's newest operations is at Parker, Arizona, where, pursuant to a 1964 lease with the Secretary of the Interior, the Colorado River Indian Agency, and the Colorado River Indian Tribes, it undertook to develop approximately 6,400 acres of uncultivated, arid land for agricultural use. The company has spent more than $3,000,000 in clearing, leveling, irrigating, and otherwise developing this land. The company began growing cantaloupes on part of the land in 1966, and has harvested a large cantaloupe crop there in each subsequent year. The cantaloupes are considered to be of higher quality than those grown in other areas of the State. Because they are highly perishable, cantaloupes must upon maturity be immediately harvested, processed, packed, and shipped in order to prevent spoilage. The processing and packing operations can be performed only in packing sheds. Because the company had no such facilities at Parker, it transported its 1966 Parker cantaloupe harvest in bulk loads to Blythe, California, 31 miles away, where it operated centralized and efficient packing shed facilities. There the melons were sorted, inspected, packed, and shipped. In 1967 the company again sent its Parker cantaloupe crop to Blythe for sorting, packing, and shipping. In 1968, however, the appellant entered the order here in issue, prohibiting the company from shipping its cantaloupes out of the State unless they were packed in containers in a manner and of a kind approved by the appellant. Because cantaloupes in the quantity involved can be so packed only in packing sheds, and because no such facilities were available to the company at Parker or anywhere else nearby in Arizona, the company faced imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $700,000. It was to prevent this unrecoverable loss that the District Court granted preliminary relief.
After discovery proceedings, an agreed statement of facts was filed with the court. It contained a stipulation that the practical effect of the appellant's order would be to compel the company to build packing facilities in or near Parker, Arizona, that would take many months to construct and would cost approximately $200,000. After briefing and argument, the court issued a permanent injunction, finding that "the order complained of constitutes an unlawful burden upon interstate commerce.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: 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. Huron Cement Co. v. Detroit, 362 U.S. 440, 443. 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.

At the core of the Arizona Fruit and Vegetable Standardization Act are the requirements that fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not "materially misrepresent" the quality of the lot as a whole. The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced. It was to prevent this that the Act was passed in 1929. The State has stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging.

We are not, then, dealing here with "state legislation in the field of safety where the propriety of local regulation has long been recognized," or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interests. We have upheld a State's power to require that produce packaged in the State be packaged in a particular kind of receptacle, Pacific States Box & Basket Co. v. White, 296 U.S. 176. And we have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. Parker v. Brown, 317 U.S. 341. Therefore, as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act. We may further assume that Arizona has full constitutional power to forbid the misleading use of its name on produce that was grown or packed elsewhere. And, to the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing.

But application of the Act through the appellant's order to the appellee company has a far different impact, and quite a different purpose. The cantaloupes grown by the company at Parker are of exceptionally high quality. The company does not pack them in Arizona and cannot do so without making a capital expenditure of approximately $200,000. It transports them in bulk to nearby Blythe, California, where they are sorted, inspected, packed, and shipped in containers that do not identify them as Arizona cantaloupes, but bear the name of their California packer. The appellant's
order would forbid the company to pack its cantaloupes outside Arizona, not for the purpose of keeping the reputation of its growers unsullied, but to enhance their reputation through the reflected good will of the company's superior produce. The appellant, in other words, is not complaining because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged.

Although it is not easy to see why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one. But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1; Johnson v. Haydel, 278 U.S. 16.

The appellant argues that the above cases are different because they involved statutes whose express or concealed purpose was to preserve or secure employment for the home State, while here the statute is a regulatory one and there is no hint of such a purpose. But in Toomer v. Witsell, supra, the Court indicated that such a burden upon interstate commerce is unconstitutional even in the absence of such a purpose. In Toomer the Court held invalid a South Carolina statute requiring that owners of shrimp boats licensed by the State to fish in the maritime belt off South Carolina must unload and pack their catch in that State before "shipping or transporting it to another State." What we said there applies to this case as well: "There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." 334 U.S., at 403-404.

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best – certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The judgment is affirmed.
Minnesota v. Clover Leaf Creamery Co.  

Justice BRENNAN delivered the opinion of the Court.

In 1977, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons. 1977 Minn. Laws, ch. 268, Minn. Stat. § 116F.21 (1978).

The purpose of the Minnesota statute is set out as § 1:

"The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged." 1977 Minn. Laws, ch. 268, § 1, codified as Minn. Stat. § 116F.21 (1978).

Section 2 of the Act forbids the retail sale of milk and fluid milk products, other than sour cream, cottage cheese, and yogurt, in nonreturnable, nonrefillable rigid or semirigid containers composed at least 50% of plastic. Minnesota Stat. § 116F.01 (1978) provides in relevant part:

"Statement of policy. The legislature seeks to encourage both the reduction of the amount and type of material entering the solid waste stream and the reuse and recycling of materials. Solid waste represents discarded materials and energy resources, and it also represents an economic burden to the people of the state. The recycling of solid waste materials is one alternative for the conservation of material and energy resources, but it is also in the public interest to reduce the amount of materials requiring recycling or disposal."

When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause. If a state law purporting to promote environmental purposes is in reality "simple economic protectionism," we have applied a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Moreover, "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." Ibid.
Minnesota’s statute does not effect "simple protectionism," but "regulates evenhandedly" by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State. . . . [T]he controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., supra, at 142. We conclude that it is not.

The burden imposed on interstate commerce by the statute is relatively minor. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of containers, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 184 (1935). Within Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bottles, and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms. Indeed, two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation are Minnesota firms.

Pulpwood producers are the only Minnesota industry likely to benefit significantly from the Act at the expense of out-of-state firms. . . . [P]lastic resin, the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms, while pulpwood, used for making paperboard, is a major Minnesota product. . . . [I]t is clear that respondents exaggerate the degree of burden on out-of-state interests, both because plastics will continue to be used in the production of plastic pouches, plastic returnable bottles, and paperboard itself, and because out-of-state pulpwood producers will presumably absorb some of the business generated by the Act.

Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems . . . . Moreover, we find that no approach with "a lesser impact on interstate activities," Pike v. Bruce Church, Inc., supra, at 142, is available. Respondents have suggested several alternative statutory schemes, but these alternatives are either more burdensome on commerce than the Act (as, for example, banning all nonreturnables) or less likely to be effective (as, for example, providing incentives for recycling). See Brief for Respondents 32-33.

In Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), we upheld a Maryland statute barring producers and refiners of petroleum products – all of which were out-of-state businesses – from retailing gasoline in the State. We stressed that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Id., at 127-128. A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.
JUSTICE STEVENS, dissenting.

The Court's Commerce Clause analysis suffers from the same flaw as its equal protection analysis. The Court rejects the findings of the Minnesota trial court, not because they are clearly erroneous, but because the Court is of the view that the Minnesota courts are not authorized to exercise such a broad power of review over the Minnesota Legislature. After rejecting the trial court's findings, the Court goes on to find that any burden the Minnesota statute may impose upon interstate commerce is not excessive in light of the substantial state interests furthered by the statute. However, the Minnesota Supreme Court expressly found that the statute is not rationally related to the substantial state interests identified by the majority. Because I believe that the Court's intrusion upon the lawmaking process of the State of Minnesota is without constitutional sanction or precedential support it is clear to me that the findings of the Minnesota Supreme Court must be respected by this Court. Accordingly, the essential predicate for the majority's conclusion that the “local benefits [are] ample to support Minnesota's decision under the Commerce Clause,” is absent.

In *Quill v. North Dakota*, 504 U.S. 298 (1992), the Court reaffirmed the rule from *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), that under dormant commerce clause analysis a state cannot require a retailer having no physical presence in that state to collect and remit sales taxes on the sales it makes. *Quill* thus gave a real competitive advantage to Internet sellers, who were in their infancy at the time. For example, Amazon started selling books in 1995. In *Quill*, Justices Scalia, Kennedy, and Thomas indicated they ruled in *Quill* based on precedent, while noting, as discussed below at § 13.4.1, that Congress could overturn *National Bellas Hess* by statute at any time. 504 U.S. 319-20. Justice White dissented from the holding. Id. at 321.

After *Quill*, states and lower federal courts struggled with the competitive advantage given by *Quill*. Cf. *Brohl v. Direct Marketing Ass’n*, 814 F.3d 1129 (10th Cir. 2016) (law requiring out-of-state retailers to report such sales to the state and notify their customers of their obligation to pay state sales tax, including an “annual purchase summary” if the customer bought more than $500 during the year, constitutional as not excessive burden under *Pike v. Bruce Church*). More recently, Justices called for the Court to reexamine *Quill*. See *District Marketing Ass’n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (“The legal system should find an appropriate case for this Court to reexamine *Quill* . . .”). In 2018, the Supreme Court overruled *Quill* in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (Roberts, C.J., joined by Breyer, Sotomayor & Kagan, JJ., dissenting based on following *Quill* as precedent without regard to the fairness of the doctrine). This decision now permits states to implement sales tax regimes for both in-state and out-of-state sales.

§ 13.4 Exceptions to Dormant Commerce Clause Doctrine: Congressional Acts and the Market Participant Exception

1. Congressional Authorization of State Action

Because dormant commerce clause review, like preemption, is based on implied congressional intent, Congress can use its Commerce Clause power to overturn any Court decision under the
dormant commerce clause, either ratifying a state law that the Court struck down, or preempting a state law that the Court held valid. For example, under the McCarran-Ferguson Act of 1945, Congress has exempted from Dormant Commerce Clause review state regulation and taxing of the business of insurance.55 This is true even though one author has argued that the Court should view dormant commerce clause doctrine not as implied congressional intent, but as a categorical constitutional rule denying states ability to regulate, as under the Cooley approach that some things “are in their nature national.”56 As a separate exception, under Article I, § 10, cl. 3, with the consent of Congress, states can “enter into any Agreement or Compact with another State,” even one that might involve burdening interstate commerce. The 1996 Northeast Dairy Compact, which permits the 6 New England states power to regulate the price of milk, is a prime example.

2. The Market Participant Exception to Dormant Commerce Clause Review

Beginning in 1976, the Court has created an additional exception to dormant commerce clause review called the “market participation” exception. In 1976, in Hughes v. Alexandria Scrap Corp.,57 the Court decided that there is no dormant commerce clause review at all if a state acts as a participant in the marketplace, rather than as a regulator or taxing authority. The analytic justification for this development was that a state should be treated equally as a business when the state is running a business. Since private businesses can choose to discriminate against interstate commerce in their choice of customers or choice of business partners, states should not be put to a competitive disadvantage in such an enterprise. The specific facts in Hughes v. Alexandria Scrap involved the state of Maryland paying bounties for every Maryland-titled junk car converted to scrap. Maryland used higher document requirements for out-of-state processors. Rejecting a dormant commerce clause challenge, Justice Powell wrote for the Court that the state's action, as a market participant, was not the kind of action with which the Clause is concerned.

The market participant theory was elaborated further in 1980 in Reeves, Inc. v. Stake,58 where the Court held that South Dakota could prefer South Dakota residents in the sale of cement from a state-owned cement plant. For a 5-4 Court, Justice Blackmun said that the framers did not intend to limit the ability of states to operate freely in the open market. Moreover, state proprietary activities often are regulated with the same restrictions imposed on private business. Justice Powell, dissenting, with Justices Brennan, White, and Stevens, said the market participant doctrine should be limited to procuring goods and services for government operations.


In *White v. Massachusetts Council of Construction Employers, Inc.*, Justice Rehnquist, writing for a 7-2 Court in 1983, upheld an order that all city construction projects should be performed by a work force consisting of at least one-half bona fide city residents. Rehnquist explained that the city was a market participant when spending its own funds because every one affected by the order was, in a sense, working for the city. Justices Blackmun and White agreed that Congress approved the favoritism but said that the city, in using its own money, went beyond Reeves to govern private economic relationships, a form of regulation.

The following year, an outer limit to the market participant doctrine was noted in *South Central Timber Development, Inc. v. Wunnik*, excerpted below. In this case, the Justices most skeptical of the market participant doctrine, Justices White, Brennan, Blackmun and Stevens (though not Justice Marshall who took no part in the decision of the case), joined in a plurality opinion, which concluded: (1) Congress did not implicitly authorize Alaska to require that timber taken from state lands and sold by the state be processed within the state prior to export; (2) in making such a rule Alaska was a regulator rather than a market participant; and (3) the Commerce Clause barred the local-processing requirement. Justices Rehnquist and O'Connor, dissenting, said Alaska was only doing indirectly what it could do directly, *i.e.*, sell only processed logs.

In another case to comment on the market participant doctrine, the Court held in 1988 that an Ohio motor vehicle fuel sales tax, which gave a tax credit for the sale of ethanol produced in Ohio, was regulatory rather than proprietary government activity, even though the purpose and effect of the credit was to subsidize a local industry. Therefore, the market participant doctrine did not apply to protect the tax from Commerce Clause scrutiny. The Court has also had to consider whether to extend the market participant exception to other constitutional doctrines, such as the Article IV, § 2 Privileges and Immunities Clause, addressed at § 14.2, which the Court has declined to do. The Court has also never really considered that while private businesses have strong profit incentives not to engage in discrimination against interstate commerce, except in unusual circumstances, and thus court review of their activities is not particularly necessary, a state-run business entity does not have the same kind of profit incentive. Thus, a doctrine based on the equivalence of state-run and private businesses may be a doctrine not based on adequate empirical premises.

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59  460 U.S. 204, 209-10 (1983); *id.* at 223-24 (Blackmun, J., joined by White, J., concurring in part and dissenting in part).


61  *Id.* at 101 (Rehnquist, J., joined by O’Connor, J., dissenting).


More recently, the market participant exception was held to apply where a state contracted with a private bridge company to build new ramps and roads to access a bridge in the state. The market participant exception was also held to apply to a case involving dormant commerce clause doctrine applied to foreign commerce.

South-Central Timber Development v. Wunnike
467 U.S. 82 (1984)

Justice WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS joined.

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided, pursuant to 11 Alaska Admin. Code § 76.130 (1974), that "[primary] manufacture within the State of Alaska will be required as a special provision of the contract." App. 35a. Under the primary-manufacture requirement, the successful bidder must partially process the timber prior to shipping it outside of the State. The requirement is imposed by contract and does not limit the export of unprocessed timber not owned by the State. The stated purpose of the requirement is to "protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis." Governor's Policy Statement, App. 28a. When it imposes the requirement, the State charges a significantly lower price for the timber than it otherwise would. Brief for Respondents 6-7.

The major method of complying with the primary-manufacture requirement is to convert the logs into cants, which are logs slabbed on at least one side. In order to satisfy the Alaska requirement, cants must be either sawed to a maximum thickness of 12 inches or squared on four sides along their entire length.


66 Antilles Cement Corp. v. Fortuno, 670 F.3d 310 (1st Cir. 2012) (protectionist Puerto Rican law that favors Puerto Rican construction materials for Commonwealth-operated or-funded projects permissible because Puerto Rico is acting as a market participant). But see American Trucking Ass'ns Inc. v. City of Los Angeles, 133 S. Ct. 2096 (2013) (mandatory concession agreement with truckers required by the Port of Los Angeles is a regulatory measure, not the City acting as a market participant, and thus is preempted by federal law).
Petitioner, South-Central Timber Development, Inc., is an Alaska corporation engaged in the business of purchasing standing timber, logging the timber, and shipping the logs into foreign commerce, almost exclusively to Japan. It does not operate a mill in Alaska and customarily sells unprocessed logs. When it learned that the primary-manufacture requirement was to be imposed on the Icy Cape sale, it brought an action in Federal District Court seeking an injunction, arguing that the requirement violated the negative implications of the Commerce Clause.

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the 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. It is equally clear that Congress may "redefine the distribution of power over interstate commerce" by "[permitting] the states to regulate the commerce in a manner which would otherwise not be permissible." Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). See also Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958-960 (1982). The Court of Appeals held that Congress had done just that by consistently endorsing primary-manufacture requirements on timber taken from federal land. 693 F.2d, at 893. Although the court recognized that cases of this Court have spoken in terms of express approval by Congress, it stated: "But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." Ibid.

We agree that federal policy with respect to federal land is "clearly delineated," but the Court of Appeals was incorrect in concluding either that there is a clearly delineated federal policy approving Alaska's local-processing requirement or that Alaska's policy with respect to its timber lands is authorized by the existence of a "parallel" federal policy with respect to federal lands.

Since 1928, the Secretary of Agriculture has restricted the export of unprocessed timber cut from National Forest lands in Alaska. The current regulation, upon which the State places heavy reliance, provides: "Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities." 36 CFR § 223.10(c) (1983).

From 1969 to 1973, Congress imposed a maximum export limitation of 350 million board-feet of unprocessed timber from federal lands lying west of the 100th meridian (a line running from central North Dakota through central Texas). 16 U.S.C. § 617(a). Beginning in 1973, Congress imposed, by way of a series of annual riders to appropriation Acts, a complete ban on foreign exports of unprocessed logs from western lands except those within Alaska. See, e.g., Pub. L. 96-126, Tit. III, § 301, 93 Stat. 979. These riders limit only foreign exports and do not require in-state processing before the timber may be sold in domestic interstate commerce. The export limitation with respect to federal land in Alaska, rather than being imposed by statute, was imposed by the above-quoted regulation, and applies to exports to other States, as well as to foreign exports.
Alaska argues that federal statutes and regulations demonstrate an affirmative expression of approval of its primary-manufacture requirement for three reasons: (1) federal timber export policy has, since 1928, treated federal timber land in Alaska differently from that in other States; (2) the Federal Government has specifically tailored its policies to ensure development of wood-processing capacity for utilization of timber from the National Forests; and (3) the regulation forbidding without prior approval the export from Alaska of unprocessed timber or its shipment to other States demonstrates that it is the Alaska wood-processing industry in particular, not the domestic wood-processing industry generally, that has been the object of federal concern.

Acceptance of Alaska’s three factual propositions does not mandate acceptance of its conclusion. Neither South-Central nor the United States challenges the existence of a federal policy to restrict the out-of-state shipment of unprocessed Alaska timber from federal lands. They challenge only the derivation from that policy of an affirmative expression of federal approval of a parallel policy with respect to state timber. They argue that our cases dealing with congressional authorization of otherwise impermissible state interference with interstate commerce have required an "express" statement of such authorization, and that no such authorization may be implied.

It is true that most of our cases have looked for an express statement of congressional policy prior to finding that state regulation is permissible. For example, in Sporhase v. Nebraska ex rel. Douglas, supra, the Court declined to find congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of interstate compacts that demonstrated Congress' deference to state water law. We noted that on those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been "expressly stated." 458 U.S., at 960. Similarly, in New England Power Co. v. New Hampshire, 455 U.S. 331 (1982), we rejected a claim by the State of New Hampshire that its restriction on the interstate flow of privately owned and produced electricity was authorized by § 201(b) of the Federal Power Act. That section provides that the Act "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U.S.C. § 824(b). We found nothing in the statute or legislative history "[evincing] a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'" 455 U.S., at 341 (quoting United States v. Public Utilities Comm'n of California, 345 U.S. 295, 304 (1953)).

The fact that the state policy in this case appears to be consistent with federal policy – or even that state policy furthers the goals we might believe that Congress had in mind – is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands. Accordingly, we reverse the contrary judgment of the Court of Appeals.

We now turn to the issues left unresolved by the Court of Appeals. The first of these issues is whether Alaska's restrictions on export of unprocessed timber from state-owned lands are exempt from Commerce Clause scrutiny under the "market-participant doctrine."
Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities. See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S., at 206-208 [1984]; Reeves, Inc. v. Stake, 447 U.S. 429, 436-437 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976). The precise contours of the market-participant doctrine have yet to be established, however, the doctrine having been applied in only [these] three cases of this Court to date.

The State of Alaska contends that its primary-manufacture requirement fits squarely within the market-participant doctrine, arguing that "Alaska's entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in Alexandria Scrap." Brief for Respondents 24. However, when Maryland became involved in the scrap market it was as a purchaser of scrap; Alaska, on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market. Alaska is not merely subsidizing local timber processing in an amount "roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives." Ibid. If the State directly subsidized the timber-processing industry by such an amount, the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State or forgoing the benefits of the subsidy and exporting unprocessed timber. Under the Alaska requirement, however, the choice is made for him.

The State also would have us find Reeves controlling. It states that "Reeves made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the terms on which it will sell its timber." Brief for Respondents 25. Such an unrestrained reading of Reeves is unwarranted. Although the Court in Reeves did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not – and did not purport to – sanction the imposition of any terms that the State might desire. For example, the Court expressly noted in Reeves that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged," 447 U.S., at 438, n. 9; that a natural resource "like coal, timber, wild game, or minerals," was not involved, but instead the cement was "the end product of a complex process whereby a costly physical plant and human labor act on raw materials," id., at 443-444; and that South Dakota did not bar resale of South Dakota cement to out-of-state purchasers, id., at 444, n.17. In this case, all three of the elements that were not present in Reeves – foreign commerce, a natural resource, and restrictions on resale – are present.

Finally, Alaska argues that since the Court in White upheld a requirement that reached beyond "the boundary of formal privity of contract," 460 U.S., at 211, n.7, then, a fortiori, the primary-manufacture requirement is permissible, because the State is not regulating contracts for resale of timber or regulating the buying and selling of timber, but is instead "a seller of timber, pure and simple." Brief for Respondents 28. Yet it is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.
That privity of contract is not always the outer boundary of permissible state activity does not necessarily mean that the Commerce Clause has no application within the boundary of formal privity. The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant." White v. Massachusetts Council of Construction Workers, Inc., 460 U.S., at 211, n.7. Contrary to the State's contention, the doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity. See Tr. of Oral Arg. 35.

At the heart of the dispute in this case is disagreement over the definition of the market. Alaska contends that it is participating in the processed timber market, although it acknowledges that it participates in no way in the actual processing. Id., at 34. South-Central argues, on the other hand, that although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant. We agree with the latter position.

There are sound reasons for distinguishing between a State's preferring its own residents in the initial disposition of goods when it is a market participant and a State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands. First, simply as a matter of intuition a state market participant has a greater interest as a "private trader" in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them. The common law recognized such a notion in the doctrine of restraints on alienation. See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911); but cf. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53, n.21 (1977). Similarly, the antitrust laws place limits on vertical restraints. It is no defense in an action charging vertical trade restraints that the same end could be achieved through vertical integration; if it were, there would be virtually no antitrust scrutiny of vertical arrangements. We reject the contention that a State's action as a market regulator may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant. We therefore find it unimportant for present purposes that the State could support its processing industry by selling only to Alaska processors, by vertical integration, or by direct subsidy. See Tr. of Oral Arg. 34, 37, 45.

Second, downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in White, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract.

Finally, the State argues that even if we find that Congress did not authorize the processing restriction, and even if we conclude that its actions do not qualify for the market-participant exception, the restriction does not substantially burden interstate or foreign commerce under ordinary Commerce Clause principles. We need not labor long over that contention.
Viewed as a naked restraint on export of unprocessed logs, there is little question that the processing requirement cannot survive scrutiny under the precedents of the Court. For example, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), we invalidated a requirement of the State of Arizona that all Arizona cantaloupes be packed within the State. The Court noted that the State's purpose was "to protect and enhance the reputation of growers within the State," a purpose we described as "surely legitimate." Id., at 143. We observed: "[The] Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. Id., at 145.

We held that if the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment, then, *a fortiori*, it forbids a State to impose such a requirement to enhance the reputation of its producers. Because of the protectionist nature of Alaska's local-processing requirement and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual *per se* invalidity of laws that "[block] the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

We are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction. It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that "the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments. " *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). In light of the substantial attention given by Congress to the subject of export restrictions on unprocessed timber, it would be peculiarly inappropriate to permit state regulation of the subject. See *Prohibit Export of Unprocessed Timber: Hearing on H.R. 639 before the Subcommittee on Forests, Family Farms, and Energy of the House Committee on Agriculture*, 97th Cong., 1st Sess. (1981).

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with the opinion of this Court.

Justice MARSHALL took no part in the decision of this case.

Justice BRENNAN, concurring.

I join Justice White's opinion in full because I believe Alaska's in-state processing requirement constitutes market regulation that is not authorized by Congress. In my view, Justice White's treatment of the market-participant doctrine and the response of Justice Rehnquist point up the inherent weakness of the doctrine. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Brennan, J., dissenting).
Justice POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

I join Parts I and II of Justice White's opinion [on congressional authorization]. I would remand the case to the Court of Appeals to allow that court to consider whether Alaska was acting as a "market participant" and whether Alaska's primary-manufacture requirement substantially burdened interstate commerce under the holding of *Pike v. Bruce Church*, 397 U.S. 137 (1970).

Justice REHNQUIST, with whom Justice O'CONNOR joins, dissenting.

In my view, the line of distinction drawn in the plurality opinion between the State as market participant and the State as market regulator is both artificial and unconvincing. The plurality draws this line "simply as a matter of intuition," but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause. For example, the plurality complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber-processing market, ibid., a classic example of a tying arrangement. See, e.g., *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 619-621 (1977). And the plurality cites the common-law doctrine of restraints on alienation and the antitrust limits on vertical restraints in dismissing the State's claim that it could accomplish exactly the same result in other ways.

Perhaps the State's actions do raise antitrust problems. But what the plurality overlooks is that the antitrust laws apply to a State only when it is acting as a market participant. See, e.g., *Jefferson County Pharmaceutical Assn., Inc. v. Abbott Laboratories*, 460 U.S. 150, 154 (1983) (state action immunity "does not apply where a State has chosen to compete in the private retail market"). When the State acts as a market regulator, it is immune from antitrust scrutiny. See *Parker v. Brown*, 317 U.S. 341, 350-352 (1943). Of course, the line of distinction in cases under the Commerce Clause need not necessarily parallel the line drawn in antitrust law. But the plurality can hardly justify placing Alaska in the market-regulator category, in this Commerce Clause case, by relying on antitrust cases that are relevant only if the State is a market participant.

The contractual term at issue here no more transforms Alaska's sale of timber into "regulation" of the processing industry than the resident-hiring preference imposed by the city of Boston in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), constituted regulation of the construction industry. Alaska is merely paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Under existing precedent, the State could accomplish that same result in any number of ways. For example, the State could choose to sell its timber only to those companies that maintain active primary-processing plants in Alaska. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). Or the State could directly subsidize the primary-processing industry within the State. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The State could even pay to have the logs processed and then enter the market only to sell processed logs. It seems to me unduly formalistic to conclude that the one path chosen by the State as best suited to promote its concerns is the path forbidden it by the Commerce Clause.

For these reasons, I would affirm the judgment of the Court of Appeals.
CHAPTER 14: CONSTITUTIONAL LIMITS ON STATE POWER

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§ 14.1 Introduction to Constitutional Limits on State Power

A range of limitations on state power appear in the Constitution. These appear principally in two places in the Constitution, Article I, § 10, addressed at § 14.1.1, and Article IV, principally addressed at § 14.1.2. The Article IV, § 2 Privileges and Immunities Clause is addressed at § 14.2. The Civil War Amendments (13th -15th), which also limit state power, are addressed at § 14.3. Federal common law and other related limitations on state power are addressed at § 14.4

1. Article I, § 10 Limitations on State Power

Article I, § 10 of the Constitutions contains three clauses providing for specific textual limitations on state power. These clauses tend to be clear in their meaning, and thus have not provided the source for many cases. These three provisions provide:

(1) No state shall enter into any treaty or alliance; coin money; pass any bill of attainder, addressed at § 16.2.2, or ex post facto law, addressed at § 16.2.3, or law impairing the obligation of contracts, addressed at §§ 18.1-18.2; or grant any title of nobility;

(2) No state shall, without the consent of Congress, lay duties on imports or exports, except what is absolutely necessary for inspection laws, and the net profit from any duties shall be held for the federal treasury; and

(3) No state shall, without the consent of Congress, keep troops or ships 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.

2. Article IV Limitations on State Power

Article IV of the Constitution has a number of provisions dealing with Admittance of New States, State Power over Property, the Guarantee Clause, Full Faith and Credit Clause, Extradition Clause, and Fugitive Slave Clause. The Privileges and Immunities Clause of Art. IV, § 2, cl.1 is addressed at § 14.2.
A. Admittance of New States

Under Article IV, § 3, cl. 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 as well as of the Congress.” The Court has never interpreted this clause, and given its text and subject-matter, any issues raised by it would probably be viewed as political questions. This would be particularly true for the first clause dealing with admission of new states into the Union by Congress, which seems a clear textually demonstrable constitutional commitment to Congress under Baker v. Carr, discussed at § 4.3.1(D) n.49.

Nevertheless, as a matter of literal textual analysis, two main issues are raised by the second and third clauses. The first issue is whether any state can be formed within the jurisdiction of any existing state with the appropriate consent given, or whether the consent clause, at the end, only applies to forming states from junctions of two or more states, or parts of states. Normal textual analysis would say the consent clause only modifies the last enumerated power under both the last antecedent maxim of grammatical construction, and the use of semi-colons, which separates the rule banning new states from being formed within the jurisdiction of any state from new states from being formed by junction of two or more states. Under this interpretation, no new state could ever be formed from parts of one existing state only. This would make the states of West Virginia, Kentucky, Maine, and possibly Vermont, all unconstitutional. As has been noted:

This is perhaps not (quite) as crazy as it seems, if one considers the Philadelphia Convention’s obsession with the rule of equal state representation in the Senate and the care the Framers took to build anti-circumvention rules into the Constitution to preserve this crucial compromise. If big States could somehow convince Congress to assent, couldn't they deal themselves more senators simply by dividing up into smaller States? (Imagine Utah today, divided into four, multiplying conservative Republican senators!)

But is Article IV, Section 3 really a reflection of such constitutional paranoia? And could Utah and Nevada not conspire to circumvent such an anticircumvention rule anyway, simply by conjoining pieces of their States to each other? For that matter, couldn't Pennsylvania lend an acre or two to West Virginia, in order to circumvent such a strict formal requirement? Or is the fact that an anti-circumvention rule is not conspiracy-proof of little probative value?

A similar problem exists with respect to the congressional joint resolution admitting Texas to the Union. In that provision, Congress authorized the Texas legislature to divide the state into as many as five states by creating four new states within its limits. As part of political maneuvering to curry

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2 Id. at 294-95.
favor with voters in Southern slaveholding states, both Democrats and Whigs supported a resolution which provided, "New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution."\(^3\)

Under this resolution, each new state would be automatically admitted into the Union, with no additional congressional action required. One author has noted: “Imagine that – five Texases! Eight additional senators and electoral votes. Four more stars on the flag. And all if the Texas legislature gets the itch to do so. But, would this be constitutional? It seems just plain weird for a state to spontaneously divide, as if it were a political amoeba. While weirdness is not a constitutional standard, it should at least cause us to ask questions.”\(^4\)

Of course, this question is not ripe for judicial review, as the Texas legislature has never come close to dividing the state, and it is not under active consideration. Under non-formalist models of constitutional interpretation, considerations of legislative and executive practice, judicial precedents assuming the constitutionality of West Virginia, Kentucky, Maine, and Vermont, and prudential considerations would likely conclude that those states are constitutional, but that any power Texas had to divide into more than one state, if it ever existed, has long since passed. From a formalist model, however, with its “static” concept of interpretation and great focus on literal text, verbal maxims of construction, and specific historical intent, and eschewing such later events as reflecting an “evolving” Constitution, those other states may be unconstitutional, and Texas might still have the power to divide. Of course, even a formalist judge might nonetheless conclude that the issues surrounding these matters are “settled law,” that doctrine discussed at § 2.4.6 n.79, or “political questions” not appropriate for Court review, that doctrine addressed at § 4.3.

The second issue raised by this clause would be that even if a state like West Virginia could be formed within the jurisdiction of Virginia alone, was actual “consent” properly given under the consent clause. As has been noted:

> In the summer of 1861, following the outbreak of the Civil War, thirty-five counties of Virginia west of the Shenandoah Valley and north of the Kanawha River met in convention in the town of Wheeling, to consider seceding from secessionist Virginia. In short order, the Wheeling convention declared itself the official, lawful, loyal government of Virginia and organized a proposed new State of (what would come to be called) West Virginia. Then, in what must certainly rank as one of the great constitutional legal fictions of all time, the legislature of

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\(^3\) Paul E. McGreal, *There is No Such Thing a Textualism: A Case Study in Constitutional Method*, 69 Fordham L. Rev. 2393 (2001), citing Joint Resolution for Annexing Texas to the United States, 28th Cong., 2d Sess., 5 Stat. 797, 798 (1845). This history surrounding the adoption of this provisions is well discussed at *id.* at 2398-2401.

\(^4\) *Id.* at 2395-96.
Virginia (at Wheeling) and the proposed government of the new State of West Virginia (at Wheeling), with the approval of Congress, agreed to the creation of a new State of West Virginia (at Wheeling), thereby purporting to satisfy the requirements of Article IV, Section 3 of the Constitution for admission of new States "formed or erected within the Jurisdiction of any other State."5

Of course, this issue of consent, if ever presented, might well be viewed as a political question for Congress to resolve. One could argue that addition of new states to the Union is similar to addition of amendments to the Constitution, and that ratification of amendments are typically viewed as political questions, addressed at § 4.3.1(B)-(C), including ratification of the 14th Amendment, which raised similar concerns of whether meaningful consent was given, addressed at § 16.4.2 nn.42-43.

B. State Power over Property

Under Article IV, § 3, cl. 2, Congress is given the 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.” As discussed at § 2.1.4 nn.21-28, state versus state cases are brought as a matter of original jurisdiction in the Supreme Court. Typically, the Court will refer the case to a special master, who will receive evidence and prepare a record, rather than the Court hearing the evidence itself. The Court's original jurisdiction has brought a variety of disputes between sovereign states within its reach, such as disputes over water apportionment and interstate commercial burdens, including controversies regarding the control of water rights and the diversion of state waters; burdensome commercial activities and restrictions imposed by another state or to collect sizable estate taxes, as when California and Texas battled over the right to tax Howard Hughes' estate; which state has the right to profits from unclaimed securities belonging to unidentified holders; and the apportionment of Civil War-era state debt following West Virginia's secession from the Commonwealth of Virginia to join Union forces.6

States can also be sued by the federal government in appropriate cases. For example, in United States v. Louisiana,7 the United States sued Louisiana for a declaration that the United States was entitled to exclusive possession of and power over lands underlying the Gulf of Mexico more than three geographical miles from the coast, with cross motions for entry of judgment in favor of Louisiana. The Court concluded that the part of Louisiana's coastline which, under the Submerged Lands Act, consisted of the “line marking seaward limit of inland waters” was to be drawn in accordance with the Convention on the Territorial Sea and Contiguous Zone, and a Special Master was appointed to make a determination of submerged lands owned by Louisiana in Gulf of Mexico.

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5 Kesavan & Paulsen, supra note 1, at 293-94.


C. The Guarantee Clause

The Guarantee Clause in the Constitution, Article IV, § 4, provides, “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.” As discussed at § 4.3.1(A)-(D), the Court has usually held that questions under the Guarantee Clause regarding federal obligations are political questions not appropriate for Court review. As a corollary to the Guarantee Clause, however, the Court has noted that the Guarantee Clause assumes that each state enters the union with a republican form of government.8

Compliance with this duty falls principally to the officials who act for the state, including its governor, attorney general, and secretary of state, but can also involve the views of state judges. A number of these cases have involved whether provisions allowing citizens directly to vote for state initiatives or referendums violate the concept of a republican form of government. One author has noted: “Many states have in fact established and increasingly use citizen ‘initiatives’ whereby the People at large directly pass laws or even amend their constitutions, rather than rely exclusively on their elected representatives. On its face, the citizen initiative seems to embody democracy in action. But even as this popular method of lawmaking spreads, so does opposition to it. A chorus of legal scholars assails direct democracy, citing two primary (related) concerns: (i) that it will tyrannize minorities, and (ii) that it will produce short-sighted, selfish legislation rather than public-spirited deliberation.”9 In cases where courts have considered the issue, such referendums have not been held to violate the requirement of a republican form of government. A particularly influential case so holding is the Oregon Supreme Court’s decision in Kadderly v. City of Portland.10 As has been noted, “Other courts quickly cited Kadderly as the answer to attacks on direct legislation in their states. The California Supreme Court cited it in 1906 to observe that the federal Guarantee Clause did not necessarily confine initiatives to local uses. The Oklahoma and Kansas courts relied on Kadderly's holding that the initiative and referendum do not conflict with the Guarantee Clause.”11

Other concerns regarding a republican form of government are unrelated to initiatives. They may involve issues of separation of powers. Former Chief Justice of the Oregon Supreme Court, Hans Linde, has noted:

8 Minor v. Happersatt, 88 U.S. 162, 175-78 (1874). As noted at § 4.3.2 n.38, while older cases used the term “Guaranty Clause,” the more recent term is “Guarantee Clause.”


10 74 P. 710 (Or. 1903), reh'g denied, 75 P. 222 (Or. 1904).

Thirty years ago, Kansas amended its constitution to reorganize executive departments subject only to legislative disapproval rather than prior authorization. The Kansas Supreme Court called squaring this change with the Guarantee Clause "the decisive question in the case," and it sustained the amendment after a lengthy review of James Madison's writings on the tests of republican government.

About the same time, the Wisconsin Supreme Court decided that republican government does not require a strict separation of executive and judicial powers. The same conclusion was announced in Colorado and in Rhode Island. In a 1991 opinion, Oklahoma's justices overcame their concern with republican government and allowed a constitutional proposal to refer all future revenue bills to the voters. These and other modern opinions faced and disposed of the issue on the merits.12

D. The Full Faith and Credit Clause

Article IV, § 1 of the United States Constitution provides, "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." In 1790, Congress enacted the first version of the full faith and credit statute. That statute provided:

That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.13

12 Id. at 953 (citations omitted). In a recent case, the issue arose whether the Massachusetts Supreme Court granting gays and lesbians the right to marry under the Equal Protection Clause of the Massachusetts Constitution usurped “legislative prerogatives” to such an extent to deprive Massachusetts of a Republican form of Government under the Guarantee Clause. Not surprisingly, such a challenge failed. In so holding, the First Circuit Court of Appeals noted that the Guarantee Clause “does not require a particular allocation of power within each state so long as a republican form of government is preserved.” Since provisions exist in Massachusetts for the legislature and voters to amend the Constitution if they so wish, no Guarantee Clause issue was seriously presented. Largess v. Supreme Judicial Court for State of Massachusetts, 373 F.3d 219, 226-29 (1st Cir. 2004).

13 Act of May 26, 1790, ch. 11, 1 Stat. 122 (1790).
Predominantly, this statute provided how state statutes and judicial records and proceedings are to be authenticated so that they may be admitted into evidence in other states, but did not literally require the effect that those proceedings would be given res judicata or collateral estoppel effect. Based on the natural law focus on purpose, as well as literal text, the Supreme Court soon held that res judicata and collateral estoppel were part of Congress’ intent in 1790. Speaking for the Court in Mills v. Duryee, Justice Story noted, “It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken. If in such Court it has the faith and credit of evidence of the highest nature, viz. record evidence, it must have the same faith and credit in every other Court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it.”

In 1948, Congress amended the full faith and credit statute, which now provides, at 28 U.S.C. § 1738, that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State." This statute has been held to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue preclusion." Under this doctrine, there still is an important difference between a formal judgment and giving “faith and credit” to one state’s laws that may differ from another state. The Court stated in Franchise Tax Board of California v. Hyatt:

As we have explained, "[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."

Perhaps the greatest area of contemporary concern under the Full Faith and Credit clause involves issues of marriage and divorce, in particular whether gay marriages or civil unions performed in those states permitting such arrangements must be given full faith and credit in other states. Historically, the divorce cases have been treated differently than the marriage cases, since divorce judgments, including property and custody decisions, are judgments of the court entitled to greater weight under the Full Faith and Credit Clause than marriage ceremonies. It has been noted:

The most common situation in which a divorce court faces the fact that the law of a state other than the forum is . . . eligible to have its law applied is where one spouse has left the marital

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14 11 U.S. (7 Cranch) 481, 484 (1813) (Story, J., opinion).
domicile and moved to a new state, leaving the other spouse – and much or even all the divisible property – in the marital domicile. The court in the new domicile may grant a divorce on grounds not recognized in the domicile of the other spouse and, if personal jurisdiction is obtained over the spouse who did not change domicile, divide the property in a manner contrary to the division law of the other involved state. The new domicile's judgment is, of course, entitled to full faith and credit under the Article IV Clause and § 1738 despite the rendering court's inability, as a matter of local practice, to apply any law other than that of the forum.17

Regarding marriages, the classic full faith and credit cases involved interracial marriages, when some states permitted them and some states did not, before the Supreme Court ruled in Loving v. Virginia in 1967 that bans on interracial marriages were unconstitutional. It has been noted:

Three classes of choice-of-law problems arose involving interracial marriages. The first were cases in which parties had traveled out of their home state for the express purpose of evading that state's prohibition of their marriages, and thereafter immediately returned home. Despite some early Northern authority to the contrary, Southern courts always invalidated these marriages. Second were cases in which the parties had not intended to evade the law, but had contracted a marriage valid where they lived, and subsequently moved to a state where interracial marriages were prohibited. These were the most difficult cases, and the Southern authorities were evenly divided on how to deal with them. Finally, there were cases in which the parties had never lived within the state, but in which the marriage was relevant to litigation conducted there. Typically, after the death of one spouse, the other sought to inherit property that was located within the forum state. In these cases, the courts invariably recognized the marriages.18

With respect to other kinds of marriage issues, some courts have recognized out-of-state marriages even when the marriage “violated the domicile's restrictions on underage marriages, on incestuous marriages (such as first cousin or uncle/niece marriages), on adultery or when divorced persons could remarry, and even on polygamous marriages for some limited purposes,”19 such as recognizing a polygamous marriage from India for inheritance purposes, but not for cohabitation purposes. On the other hand, other courts have refused to recognize such marriages.20

17 William A. Reppy, Jr., The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages, 3 Ave Maria L. Rev. 393, 454 (2005).


20 See, e.g., Catalano v. Catalano, 170 A.2d 726 (Ct. 1961) (refusing to recognize an uncle/niece marriage entered into in Italy because the Connecticut criminal incest statute expressed
A range of issues are implicated by this issue: persons migrating to a state or temporarily passing through a state; marriages of persons who never set foot in a state as a married couple, but whose status is relevant to litigation in the state; children of same-sex couples who enter a state, temporarily or permanently, and whose status needs to be determined; individual same-sex spouses entering a state who seek to avoid obligations of marital property and child support; persons entering a state trying to avoid money judgments rendered in another state; same-sex spouses entering a state who seek declarations of nullity from state courts; and persons entering a state who wish to contract new marriages without having to dissolve the previous ones. Despite extensive commentary both supporting giving such same-sex marriages full faith and credit, and denying it, the issue was resolved in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), discussed at § 25.4.1, where the Court struck down all bans on same-sex marriage nationwide, and held all states must give full faith and credit to same-sex marriages in other states, just as the full faith and credit issue for interracial marriages was mooted by the Supreme Court in *Loving v. Virginia*, excerpted at § 20.3, which struck down all bans on interracial marriages.

**E. The Extradition Clause**

Article IV, § 2, cl. 2 provides, “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

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a strong public policy against recognition); Whelan v. Whelan, 105 N.E.2d 314 (Ill. App. Ct. 1952) (refusing to recognize Kentucky marriage between Illinois residents who were first cousins); Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (refusing to recognize marriage by underage New Jersey residents in Indiana); Maurer v. Maurer, 60 A.2d 440 (Pa. Super. Ct. 1948) (refusing to recognize marriage in Maryland for express purpose of evading Pennsylvania's paramour law, which provided an adulterer cannot marry his accomplice in adultery); In re Vetas' Estate, 170 P.2d 183 (Utah 1946) (refusing to recognize a common law marriage entered into in Idaho).

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Jurisdiction of the Crime.” The states’ rights Taney Court held in 1861 in *Kentucky v. Dennison*\(^{23}\) that the federal courts could not enforce the obligation of a state to comply with the Extradition Clause. In contrast, the Court held in 1987 in *Puerto Rico v. Branstad*\(^{24}\) that the *Dennison* doctrine, whether rightly or wrongly decided at the time, was inconsistent with Court doctrine after 1868 regarding the ability of federal courts to require states to comply with constitutional obligations, as in *Brown v. Board of Education (Brown II)*, addressed at § 21.1. Thus, *Dennison* was overruled.

**F. The Fugitive Slave Clause**

Under Article IV, § 2, cl. 3, the Fugitive Slave Clause, “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 of Labour may be due.”

Congress passed the first Fugitive Slave Law in 1793. The 1793 law dealt generally with fugitives from justice, but it was applied primarily to fugitive slaves. In 1818 and 1820, Congress passed laws that punished participants in the importation of slaves, although by that time children born to slaves in the United States predominantly satisfied Southern economic needs. In 1820, Congress passed the Missouri Compromise, which limited slavery predominantly to Southern states, by providing that "slavery and involuntary servitude . . . shall be, and is hereby forever prohibited" in all of the territory acquired from France in the Louisiana Purchase, which lies “north of thirty-six degrees and thirty minutes north latitude,” as long as the fugitive laws were enforced in those territories and states. In 1850, as part of a grand Compromise between Northern and Southern interests, California entered the Union as a free state; the slave trade ended in the District of Columbia; the rest of the land in the West other than California acquired from Mexico after the Mexican-American War of 1848 was open to slave and free states; and there was a new, more vigorous Fugitive Slave Law.

Under the Fugitive Slave Act of 1850, it was not only criminal for the fugitive to run away, but also for others to hinder the arrest or assist in the escape, either directly or indirectly. It has been noted:

> The new Fugitive Act also increased the fines for committing the prohibited acts, from five hundred dollars to one thousand dollars, and required payment to the claimant. Moreover, section eight of the bill stipulated that if the commissioner found for the claimant a ten-dollar fee was to be paid to the commissioner, but if the finding was for the defendant, then there was only a five-dollar payment. This obviously gave an incentive to the judge or commissioner hearing the case to find in favor of the claimant and raised numerous constitutional questions.

> The initial effect of the Fugitive Slave Law was more far reaching than might first be supposed. There was a great migration of blacks into Canada. Even the city of Boston, which was...


presumed as safe as Canada, no longer was, for the state laws that had protected fugitives were now overshadowed by federal laws. The second effect that the Fugitive Slave Law had was that it radically changed the dynamic of the abolitionists. For years, the abolitionists had to fight indirectly at a distance, but with the new Fugitive Slave act, they now had an immediate object to face head on. People who had been disinterested were now forced to get involved. Because of these developments, the abolitionists became more organized. In several cities they started what were called Vigilance Committees. The sole purpose of these organizations was to hinder the efforts of the bounty hunters and commissioners operating under the new law . . . .

Soon after the Compromise of 1850, Congress amended the Missouri Compromise to provide in the Kansas-Nebraska Act of 1854 that the settlers of new territories could decide for themselves whether to make slavery legal or illegal. This Act led to an outbreak of fighting in the Kansas-Nebraska territories among pro-slavery and anti-slavery forces. The rest of the story regarding events leading up to the Civil War, and the subsequent banning of slavery in the United States by the 13th Amendment is addressed at § 16.4.2.

§ 14.2 Article IV, § 2 Privileges and Immunities Clause

1. Background History: The Pre-1937 Doctrine

The Privileges and Immunities Clause of Article IV, § 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Two issues have dominated interpretation of this provision. The first is defining what are the "privileges and immunities" that the Clause protects. The second is what does it mean for the citizens of each state to be "entitled to" such privileges and immunities "of Citizens in the several States.”

With respect to the first issue, in 1823 Justice Washington wrote, on circuit, in Corfield v. Coryell, that the Privileges and Immunities Clause of Article IV, Section 2, applies only to privileges and immunities that are "fundamental" to the citizens of all free governments, e.g., rights to pass through, reside in, own property in, engage in common occupations, and be exempt from higher taxes than paid by citizens of the state. Corfield was followed in 1871 by the Court in McCready v. Virginia, where the Court held that the Privileges and Immunities Clause does not require a state to allow non-residents to share in the common property of the state's citizens, such as the state's wild animals and fishes, and a state may limit to its own citizens the right to plant oysters in public waters.


26 Id. at 262-65. See also Stephen B. Oates, To Purge This Land with Blood: A Biography of John Brown 90-98 (2d ed. 1984).

27 6 F. Cas. 546, 551-52 (1823).

28 94 U.S. 391, 394-96 (1871).
The Court formally adopted the Corfield approach in 1873 in the Slaughter-House Cases, holding that Justice Washington’s approach was correct in limiting the Privileges and Immunities Clause protection to fundamental rights. Thus, under this interpretation, states are not required to refrain from all discrimination between local citizens and citizens of other states. This is consistent with the practice of most Western industrialized countries with federal systems of government.

With respect to the second issue, Chief Justice Taney wrote in Dred Scott v. Sandford that the Clause gave the citizens of each state an equality in personal and property rights in each other state that such citizen might enter without becoming a resident and, thus, becoming a citizen of that state. The areas of equality were those privileges and immunities granted generally by a state to its own citizens as a group. However, the Clause did not grant equal protection comprehensively because a state was not barred from creating inequalities in rights among its own citizens or between them and outsiders who were not citizens of another state. Given this interpretation, before the Civil War the Privileges and Immunities Clause did not protect free African-Americans, in either Northern states or United States Territories, from discrimination, such as denying them the right to vote or requiring that they post a bond to reside in the state or move into the state or territory from another state.32 One solution to this problem was the Equal Protection Clause of the 14th Amendment, ratified in 1868, which provides, "No state shall deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court has never explicitly acknowledged a connection between the Article IV, § 2 Privileges and Immunities Clause and the Equal Protection Clause. However, one relationship between the two clauses is reflected in Supreme Court doctrine that while the term “citizen” in the Privileges and Immunities Clause also includes “residents,” that is, persons lawfully residing in the state, the term “citizen” does not include aliens or corporations, while both aliens and corporations are “persons” under the Equal Protection and Due Process Clauses.

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The modern test under the Article IV, § 2 Privileges and Immunities Clause was first stated by a Holmesian Court in 1948 in *Toomer v. Witsell.*36 Under *Toomer,* the plaintiff must show that a state or municipal law discriminates against citizens of other states and that the discrimination relates to a fundamental privilege or immunity, one bearing on the vitality of the nation as a single entity. If the plaintiff makes this prima facie case, and thus triggers the Privileges and Immunities Clause, the burden then shifts to the state. The Court will presume the state has violated the Clause, unless the state can show that substantial reasons exist for the difference in treatment, and the discrimination is closely related to those reasons, considering the availability of less discriminatory means.37

As applied by modern courts, this “substantial reasons/close relationship” test is a version of the “substantial or important” governmental interest and “substantial relationship/narrowly drawn” test of intermediate scrutiny under the Equal Protection Clause, discussed at § 20.1 nn.12-24. This similarity underscores the practical connection between Privileges and Immunities Clause and Equal Protection Clause doctrine. Such a substantial reason may be established by showing that nonresidents are a peculiar source of the evil at which the law is aimed. The close relation does not exist, however, if the state could achieve its ends by substantially less discriminatory means.38

Determining whether a right is “fundamental” tracks the substantive due process doctrine of “fundamental” rights, addressed at § 25.1. As that doctrine was phrased in 1997 by Chief Justice Rehnquist in *Washington v. Glucksberg,*39 fundamental rights are “those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions [as to be ranked as fundamental], or so fundamental to our concept of constitutionally ordered liberty.” Reflecting similar terminology, the Court held in *Baldwin v. Montana Fish and Game Commission*40 that a state may charge nonresidents a higher fee to hunt elk as a sport without violating the Clause. The reason was that although states cannot impede interstate commerce by hoarding resources, the Privileges and Immunities Clause protects only interests which are “fundamental,” that is, interests “sufficiently basic to the livelihood of the nation,” and hunting elk for sport is not such an interest. In contrast, in *Hicklin v. Orbeck,*41 Justice Brennan wrote that Alaska cannot require oil and gas

36 334 U.S. 385 (1948).
38 *Toomer,* 334 U.S. at 398.
pipelines to prefer residents as employees because: (1) engaging in a common calling is fundamental to the national economy and interstate harmony, (2) discrimination against such a privilege is barred without a substantial supporting reason, and (3) such reason does not exist unless nonresidents are “the” source of the problem and the discrimination bears a “substantial relationship” to the problem.

Writing for the Court in United Building and Construction Trades Council v. Camden, Justice Rehnquist did not require nonresidents to be "the" source of the problem. It was enough if they were "a" source of the evil. In United Building, the Court considered whether the Clause was violated by a municipal ordinance which, as part of a state-wide affirmative action program, required that at least 40% of the employees of contractors and subcontractors working on city construction projects be local residents. The Court first held that the Privileges and Immunities Clause applies to city ordinances since cities are merely subdivisions of a state. Second, the ordinance was not immune from review simply because some in-state residents were disadvantaged. Citizens not residing in the city cannot be counted on to protect the interests of out-of-state residents. This result is consistent with Dean Milk, excerpted at § 13.3.3, where the city of Madison’s discrimination against both out-of-city and out-of-state milk refineries raised problems under the dormant commerce clause. Third, the ordinance burdened the pursuit of a common calling, and that is a privilege sufficiently basic for interstate harmony to fall within the clause.

In applying the Toomer test, the Court has not allowed a state to discriminate against nonresidents regarding employment in the oil industry, as in Hicklin v. Orbeck; has refused to allow states to deny nonresidents access to medical services, as in Doe v. Bolton; and has refused to allow a state to deny nonresidents the right to engage in commercial shrimp fishing, as in Toomer v. Witsell. On the other hand, states are permitted to have different tuition rates for state universities for resident and non-resident students without any extended Privileges and Immunities Clause analysis. While for most of our nation’s history, given lower university attendance rates, obtaining a post-high school degree was understandably viewed as not “sufficiently basic to the livelihood of the nation,” in today’s modern high-technology climate, this aspect perhaps deserves to be rethought.

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45 334 U.S. 385 (1948).
46 See generally, Vlandis v. Kline, 412 U.S. 441, 445 (1973) (“[T]he option of the State to classify students as resident and nonresident students, thereby obligat[ing] nonresident students to pay higher tuition and fees than do bona fide residents . . . is unquestioned here.”); id. at 454-55 (Marshall, J., joined by Brennan, J., concurring) (“I recognize that in Starns v. Malkerson, 401 U.S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary disposition.”).
Three recent applications of the Clause were in the context of nonresident admission to practice law. Those cases make clear that the required “substantial reason/close relationship” test is a version of intermediate scrutiny requiring the state to prove its action: (1) advances important or substantial government interests; (2) is substantially related to advancing those interests; and (3) is not substantially more discriminatory than it needs to be.

In *Supreme Court of New Hampshire v. Piper*,\(^\text{47}\) for an 8-1 Court, Justice Powell wrote that denying admission to nonresidents who have passed a state's bar exam triggers a Privileges and Immunities Clause analysis, since practicing law is an activity sufficiently basic to the livelihood of the Nation. The first goal advanced by the state, having lawyers be familiar with local law, was dismissed by the Court because the state, which has the burden of proof, presented no evidence that nonresident attorneys would be any less likely to keep abreast of the law than resident attorneys. A second state concern with ensuring ethical practice was dismissed because there was no reason to believe that a nonresident lawyer would conduct his practice in a more dishonest manner than a resident lawyer. These two reasons thus failed the “substantial relationship” part of the intermediate scrutiny.

The state’s third reason for the discrimination, having lawyers available for court proceedings, while perhaps related to the in-state residency requirement, could be reached by the substantially less discriminatory means of requiring local counsel if availability proved to be a problem. The fourth reason, promoting *pro bono* work, could also be advanced by a substantially less discriminating means, requiring all licensed attorneys to do *pro bono* work. These two reasons thus failed the third “substantially more discriminatory than necessary” part of intermediate scrutiny. Reflecting his conservative predisposition to defer to states, Justice Rehnquist dissented in the case.

In *Supreme Court of Virginia v. Friedman*,\(^\text{48}\) excerpted below, for a 7-2 Court, Justice Kennedy invalidated the condition in Virginia's reciprocity admissions procedure that a lawyer otherwise qualified for admission "on motion" be a permanent resident of Virginia. It was irrelevant that Virginia could require all applicants to pass the bar. The question was whether Virginia could discriminate among otherwise equally qualified applicants solely because of residence, which, for analytic purposes, is equal to citizenship. Justice Kennedy wrote that the state could pursue its goals as well with adequate nondiscriminatory means. First, the Court could not say that nonresidents were less likely to respect the bar and be familiar with Virginia law, especially since Virginia requires an oath of intention to maintain an office and a regular practice in the state. Second, requiring attorneys to keep up-to-date on the law can be accomplished by requiring attendance at periodic continuing legal education courses. Finally, the law's office requirement is fully adequate to protect whatever interest the state may have in requiring its lawyers to practice full-time. Reflecting their conservative predisposition to defer to states, Chief Justice Rehnquist and Justice Scalia dissented in this case, saying that the states should be free to consider residence when admitting lawyers.

\(^{47}\) 470 U.S. 274 (1985); *id.* at 289-90 (Rehnquist, J., dissenting).

\(^{48}\) 487 U.S. 59 (1988); *id.* at 70-71 (Rehnquist, C.J., joined by Scalia, J., dissenting).
In the third case, *Barnard v. Thorstenn*, the Court held that after Congress by statute made the Privileges and Immunities Clause of Article IV apply to the Virgin Islands, those islands could not make residence a requirement for admission to the bar. The Court found no substantial relationship to legislative goals because adequate non-discriminatory alternatives were available. For example, the interest in assuring that counsel will be available on short notice for unscheduled proceedings could be served by associating with local counsel. And, as in the previous cases, excluding residents as a class was not required to solve the problems of conflicting appearances, keeping knowledge current, or supervising lawyer ethics. The Court explained that the underlying policy was an understanding that our Founders "thought it important to our sense of nationhood that each State be required to make a genuine effort to treat nonresidents on an equal basis with residents." Chief Justice Rehnquist dissented, joined by Justices White and O'Connor, on the ground that the conditions of practice in the distant and isolated Virgin Islands justified a residence requirement.

**Supreme Court of Virginia v. Friedman**

487 U.S. 59 (1988)

Justice KENNEDY delivered the opinion of the Court.

Qualified lawyers admitted to practice in other States may be admitted to the Virginia Bar "on motion," that is, without taking the bar examination which Virginia otherwise requires. The State conditions such admission on a showing, among other matters, that the applicant is a permanent resident of Virginia. The question for decision is whether this residency requirement violates the Privileges and Immunities Clause of the United States Constitution, Art. IV, § 2, cl. 1. We hold that it does.

Myrna E. Friedman was admitted to the Illinois Bar by examination in 1977 and to the District of Columbia Bar by reciprocity in 1980. From 1977 to 1981, she was employed by the Department of the Navy in Arlington, Virginia, as a civilian attorney, and from 1982 until 1986, she was an attorney in private practice in Washington, D.C. In January 1986, she became associate general counsel for ERC International, Inc., a Delaware corporation. Friedman practices and maintains her offices at the company's principal place of business in Vienna, Virginia. Her duties at ERC International include drafting contracts and advising her employer and its subsidiaries on matters of Virginia law.

From 1977 to early 1986, Friedman lived in Virginia. In February 1986, however, she married and moved to her husband's home in Cheverly, Maryland. In June 1986, Friedman applied for admission to the Virginia Bar on motion.

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The applicable rule, promulgated by the Supreme Court of Virginia pursuant to statute, is Rule 1A:1. The Rule permits admission on motion of attorneys who are licensed to practice in another jurisdiction, provided the other jurisdiction admits Virginia attorneys without examination. The applicant must have been licensed for at least five years and the Virginia Supreme Court must determine that the applicant:

"(a) Is a proper person to practice law.

"(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

"(c) Has become a permanent resident of the Commonwealth.

"(d) Intends to practice full time as a member of the Virginia bar."

In a letter accompanying her application, Friedman alerted the Clerk of the Virginia Supreme Court to her change of residence, but argued that her application should nevertheless be granted. Friedman gave assurance that she would be engaged full-time in the practice of law in Virginia, that she would be available for service of process and court appearances, and that she would keep informed of local rules. She also asserted that "there appears to be no reason to discriminate against my petition as a nonresident for admission to the Bar on motion," that her circumstances fit within the purview of this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), and that accordingly she was entitled to admission under the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, cl. 1. See App. 34-35.

Article IV, § 2, cl. 1, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The provision was designed "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." *Paul v. Virginia*, 8 Wall. 168, 180 (1869). See also *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"). The Clause "thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975).

While the Privileges and Immunities Clause cites the term "Citizens," for analytic purposes citizenship and residency are essentially interchangeable. See *United Building & Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 216 (1984). When examining claims that a citizenship or residency classification offends privileges and immunities protections, we undertake a two-step inquiry. First, the activity in question must be "sufficiently basic to the livelihood of the Nation" as to fall within the purview of the Privileges and Immunities Clause . . . ." *Id.*, at 221-222, quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 388 (1978). For it is "[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment."
Supreme Court of New Hampshire v. Piper, 470 U.S., at 279, quoting Baldwin, supra, at 383. Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest. Piper, supra, at 284. Appellants assert that the residency requirement offends neither part of this test. We disagree.

Appellants concede, as they must, that our decision in Piper establishes that a nonresident who takes and passes an examination prescribed by the State, and who otherwise is qualified for the practice of law, has an interest in practicing law that is protected by the Privileges and Immunities Clause. Appellants contend, however, that the discretionary admission provided for by Rule 1A:1 is not a privilege protected by the Clause for two reasons. First, appellants argue that the bar examination "serves as an adequate, alternative means of gaining admission to the bar." Brief for Appellants 20. In appellants' view, "[s]o long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination," id., at 21, the State cannot be said to have discriminated against nonresidents "as a matter of fundamental concern." Id., at 19. Second, appellants argue that the right to admission on motion is not within the purview of the Clause because, without offense to the Constitution, the State could require all bar applicants to pass an examination. Neither argument is persuasive.

We cannot accept appellants' first theory because it is quite inconsistent with our precedents. We reaffirmed in Piper the well-settled principle that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.' Piper, supra, at 280, quoting Toomer v. Witsell, supra, at 396. See also United Building & Construction Trades Council, supra, at 219 ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause"). After reviewing our precedents, we explicitly held that the practice of law, like other occupations considered in those cases, is sufficiently basic to the national economy to be deemed a privilege protected by the Clause. See Piper, supra, at 280-281. The clear import of Piper is that the Clause is implicated whenever, as is the case here, a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents.

Nothing in our precedents, moreover, supports the contention that the Privileges and Immunities Clause does not reach a State's discrimination against nonresidents when such discrimination does not result in their total exclusion from the State. In Ward v. Maryland, 12 Wall. 418 (1871), for example, the Court invalidated a statute under which residents paid an annual fee of $ 12 to $ 150 for a license to trade foreign goods, while nonresidents were required to pay $ 300. Similarly, in Toomer, supra, the Court held that nonresident fishermen could not be required to pay a license fee 100 times the fee charged to residents. In Hicklin v. Orbeck, 437 U.S. 518 (1978), the Court invalidated a statute requiring that residents be hired in preference to nonresidents for all positions related to the development of the State's oil and gas resources. Indeed, as the Court of Appeals correctly noted, the New Hampshire rule struck down in Piper did not result in the total exclusion of nonresidents from the practice of law in that State. 822 F. 2d, at 427 (citing Piper, supra, at 277, n.2).
Further, we find appellants' second theory – that Virginia could constitutionally require that all applicants to its bar take and pass an examination – is quite irrelevant to the question whether the Clause is applicable in the circumstances of this case. A State's abstract authority to require from resident and nonresident alike that which it has chosen to demand from the nonresident alone has never been held to shield the discriminatory distinction from the reach of the Privileges and Immunities Clause. Thus, the applicability of the Clause to the present case no more turns on the legality \textit{vel non} of an examination requirement than it turned on the inherent reasonableness of the fees charged to nonresidents in \textit{Toomer} and \textit{Ward}. The issue instead is whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. We conclude it has.

Our conclusion that the residence requirement burdens a privilege protected by the Privileges and Immunities Clause does not conclude the matter, of course; for we repeatedly have recognized that the Clause, like other constitutional provisions, is not an absolute. See, e.g., Piper, supra, at 284; United Building & Construction Trades Council, 465 U.S., at 222; Toomer, 334 U.S., at 396. The Clause does not preclude disparity in treatment where substantial reasons exist for the discrimination and the degree of discrimination bears a close relation to such reasons. See United Building & Construction Trades Council, supra, at 222. In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State, the Court has considered whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns. See Piper, supra, at 284.

Appellants offer two principal justifications for the Rule's requirement that applicants seeking admission on motion reside within the Commonwealth of Virginia. First, they contend that the residence requirement assures, in tandem with the full-time practice requirement, that attorneys admitted on motion will have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination. Attorneys admitted on motion, appellants argue, have "no personal investment" in the jurisdiction; consequently, they "are entitled to no presumption that they will willingly and actively participate in bar activities and obligations, or fulfill their public service responsibilities to the State's client community." Brief for Appellants 26-27. Second, appellants argue that the residency requirement facilitates enforcement of the full-time practice requirement of Rule 1A:1. We find each of these justifications insufficient to meet the State's burden of showing that the discrimination is warranted by a substantial state objective and closely drawn to its achievement.

We acknowledge that a bar examination is one method of assuring that the admitted attorney has a stake in his or her professional licensure and a concomitant interest in the integrity and standards of the bar. A bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise. The question, however, is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents. We cannot say this is the case.
Friedman's case proves the point. She earns her living working as an attorney in Virginia, and it is of scant relevance that her residence is located in the neighboring State of Maryland. It is indisputable that she has a substantial stake in the practice of law in Virginia. Indeed, despite appellants' suggestion at oral argument that Friedman's case is "atypical," Tr. of Oral Arg. 51, the same will likely be true of all nonresident attorneys who are admitted on motion to the Virginia Bar, in light of the State's requirement that attorneys so admitted show their intention to maintain an office and a regular practice in the State. See Application of Brown, 191 S.E.2d 812, 815, n.3 (Va. 1972) (interpreting full-time practice requirement of Rule 1A:1). This requirement goes a long way toward ensuring that such attorneys will have an interest in the practice of law in Virginia that is at least comparable to the interest we ascribed in Piper to applicants admitted upon examination. Accordingly, we see no reason to assume that nonresident attorneys who, like Friedman, seek admission to the Virginia bar on motion will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties.

Further, to the extent that the State is justifiably concerned with ensuring that its attorneys keep abreast of legal developments, it can protect these interests through other equally or more effective means that do not themselves infringe constitutional protections. While this Court is not well positioned to dictate specific legislative choices to the State, it is sufficient to note that such alternatives exist and that the State, in the exercise of its legislative prerogatives, is free to implement them. The Supreme Court of Virginia could, for example, require mandatory attendance at periodic continuing legal education courses. See Piper, supra, at 285, n.19. The same is true with respect to the State's interest that the nonresident bar member does his or her share of volunteer and pro bono work. A "nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participat in formal legal-aid work." Piper, supra, at 287 (footnote omitted).

We also reject appellants' attempt to justify the residency restriction as a necessary aid to the enforcement of the full-time practice requirement of Rule 1A:1. Virginia already requires, pursuant to the full-time practice restriction of Rule 1A:1, that attorneys admitted on motion maintain an office for the practice of law in Virginia. As the Court of Appeals noted, the requirement that applicants maintain an office in Virginia facilitates compliance with the full-time practice requirement in nearly the identical manner that the residency restriction does, rendering the latter restriction largely redundant. 822 F. 2d, at 429. The office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but also is fully adequate to protect whatever interest the State might have in the full-time practice restriction.

We hold that Virginia's residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause. The nonresident's interest in practicing law on terms of substantial equality with those enjoyed by residents is a privilege protected by the Clause. A State may not discriminate against nonresidents unless it shows that such discrimination bears a close relation to the achievement of substantial state objectives. Virginia has failed to make this showing. Accordingly, the judgment of the Court of Appeals is affirmed.
Chief Justice REHNQUIST, with whom Justice SCALIA joins, dissenting.

Three Terms ago the Court invalidated a New Hampshire Bar rule which denied admission to an applicant who had passed the state bar examination because she was not, and would not become, a resident of the State. Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). In the present case the Court extends the reasoning of Piper to invalidate a Virginia Bar rule allowing admission on motion without examination to qualified applicants, but restricting the privilege to those applicants who have become residents of the State.

For the reasons stated in my dissent in Piper, I also disagree with the Court's decision in this case. I continue to believe that the Privileges and Immunities Clause of Article IV, § 2, does not require States to ignore residency when admitting lawyers to practice in the way that they must ignore residency when licensing traders in foreign goods, Ward v. Maryland, 12 Wall. 418 (1871), or when licensing commercial shrimp fishermen, Toomer v. Witsell, 334 U.S. 385 (1948).

I think the effect of today's decision is unfortunate even apart from what I believe is its mistaken view of the Privileges and Immunities Clause. Virginia's rule allowing admission on motion is an ameliorative provision, recognizing the fact that previous practice in another State may qualify a new resident of Virginia to practice there without the necessity of taking another bar examination. The Court's ruling penalizes Virginia, which has at least gone part way towards accommodating the present mobility of our population, but of course leaves untouched the rules of those States which allow no reciprocal admission on motion. [FN: At present, 28 states do not allow reciprocal admission on motion: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wyoming.] Virginia may of course retain the privilege of admission on motion without enforcing a residency requirement even after today's decision, but it might also decide to eliminate admission on motion altogether.

Reciprocity rules vary greatly from state to state, but the trend has been in favor of extending or relaxing reciprocity requirements. One website on the issue is: www.barreciprocity.com. While 28 states had no form of reciprocity in 1988, as Chief Justice Rehnquist dissent noted above, this website indicates that as of 2014 only 12 states had no form of reciprocity or admission by motion today: California, Delaware, Florida, Hawaii, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, Rhode Island, and South Carolina.

In 2013, in McBurney v. Young, the Supreme Court held that access to public information under a state’s Freedom of Information Act is not a “fundamental” right for non-residents, and thus Virginia could restrict application of its Freedom of Information Act to Virginia residents.

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50 133 S. Ct. 1709 (2013) (unanimous opinion).
§ 14.3 Incorporation of the Bill of Rights Made Applicable to the States

1. Historical Review of the Incorporation Debate

A. The Original Natural Law Era: 1789-1873

In 1833, the Court held in *Barron v. City of Baltimore*\(^{51}\) that the Bill of Rights applied only to the federal government. In a case involving whether the Takings Clause of the Fifth Amendment applied against the states, Chief Justice Marshall said that limitations on power expressed in general terms apply only to the government created by an instrument. This reflected the “Dual Theory of Sovereignty” understanding of the Constitution and the Tenth Amendment, addressed at § 8.2.2 nn.32-38. The Bill of Rights was intended only to secure against federal encroachments.

*Barron v. City of Baltimore*

32 U.S. 243 (1833)

Chief Justice MARSHALL delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the judiciary act.

The plaintiff in error contends, that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists, that this amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists, that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. It support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think, that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court.

The preceding section [Art. I, § 9] contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares, that “no bill of attainder or ex post facto law shall be passed.” No language can be more general; yet the demonstration is complete, that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section [Art. I., § 10], the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares, that “no state shall pass any bill of attainder or ex post facto law.” This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. “No state shall enter into any treaty,” &c. Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the states. [Ed: That is, since Art. I, § 10 contains specific limitations on states, that implies other constitutional provisions, like Art. I, § 9 and the Bill of Rights, only apply to the federal government].

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safe-guards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves. A convention could have been assembled by the discontented state, and the required improvements could have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being, as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have
expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

B. The Formalist Era: 1873-1937

Following the Civil War, limitations on state power were imposed by ratification of the 13th, 14th, and 15th Amendments between 1865 and 1870. The Court first interpreted these amendments in the *Slaughter-House Cases*,\(^52\) decided in 1873, holding that the 14th Amendment Privileges or Immunities Clause protects only a limited list of rights which persons hold as citizens of the United States, distinguishing these rights from those held as citizens of states under the Article IV, § 2 Privileges and Immunities Clause. Reflecting formalist reluctance to use legislative history, the Court did not mention the extensive legislative history used by Justice Black, dissenting in *Adamson v. California*,\(^53\) discussed at § 14.3.1(C) n.65, which suggested that the Privileges or Immunities Clause of the 14th Amendment was intended to overrule *Barron v. Baltimore* by forbidding states from abridging the privileges and immunities of United States citizens identified in the first eight Amendments. Without regard to the Bill of Rights issue, four Justices dissented and would have held that Louisiana's state-granted economic monopoly violated “privileges or immunities” rights of any United States citizen to contract with whomever they please.\(^54\) This position foreshadowed the development of the *Lochner* doctrine, addressed at § 17.1-17.2.

The Court also concluded in its *Slaughter-House Cases* opinion that Louisiana's state-granted economic monopoly did not violate the Equal Protection Clause, which the Court suspected would be limited to racial matters, or the Due Process Clause, probably because due process was thought to relate only to procedure.\(^55\) After the *Slaughter-House Cases*, the privileges of state citizens

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\(^52\) 83 U.S. (16 Wall.) 36, 79-80 (1873). The Court stated, “But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws. [In] *Crandall v. Nevada* [73 U.S. (6 Wall.) 36, 44 (1867)] [i]t is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, ‘to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.’” *Id.* at 79.


\(^54\) 83 U.S. at 96-106 (Field, J., joined by Chase, C.J., and Bradley & Swayne, JJ., dissenting).

\(^55\) *Id.* at 80-81.
continued to be protected by the Privileges and Immunities Clause of Article IV, § 2, but only against state laws that discriminated without adequate justification against non-residents, not a general right of equal protection, as discussed at § 14.2.1 nn.31-35.

Through a series of doctrinal transformations, the Civil War Amendment provisions relating to due process, equal protection, and slavery or involuntary servitude gradually came to have a far greater scope in granting individuals protection from state action than the Court held or suggested in the Slaughter-House Cases. The development with respect to slavery or involuntary servitude is discussed at § 16.4.2. The developments with respect to equal protection are addressed in Chapters 19-24, dealing with, among other things, race, ethnic, and national origin discrimination; gender discrimination; illegitimacy classifications; alienage classifications; disability classifications; age classifications; sexual orientation; and right to travel, access to court, and access to the ballot and right to vote. The impact of the 15th Amendment on the right to vote is also discussed in Chapter 24. The developments with respect to due process are addressed in Chapters 25-28.

The question of whether some or all of the specific rights enumerated in the first eight Amendments are safeguarded against state action by the Due Process Clause of the 14th Amendment was first explicitly addressed by the Court in 1897 in Chicago, Burlington & Quincy Railroad v. Chicago.56 In Chicago, Burlington, the Court held that the Takings Clause of the Fifth Amendment was an aspect of Due Process, and thus applicable against the states. The Court also noted, in dicta, that the last clause of the Seventh Amendment, dealing with the inability of federal courts to reexamine facts tried by juries other than according to the rules of the common law, applied not only to cases tried in federal courts, but to cases tried in state courts and appealed to the Supreme Court.57

A case raising the issue whether a criminal defendant’s rights were a part of due process occurred in 1908 in Twining v. New Jersey.58 In a state court prosecution, the jury had been instructed that it might draw an unfavorable inference from defendant's refusal to testify. The Court said that the Fifth Amendment's bar against self-incrimination does not apply to the states, citing Barron v. Baltimore. Nor was there a denial of a privilege or immunity of a citizen of the United States, citing the Slaughter-House Cases. As to whether the concept of due process includes protection from self-incrimination, the Court asked whether the exemption from self-incrimination is a “fundamental” principle of liberty and justice that “inhere[s] in the very idea of free government” and is the inalienable right of a citizen of such a government. In answering that question, the Court followed a formalist emphasis on text and history. As to text, Congress in submitting the Bill of Rights to the states treated due process of law and the privilege of self-incrimination as exclusive of each other.

56 166 U.S. 226, 244-46, 253-57 (1897). Three years earlier, the Court had applied the Takings Clause against the states under an Equal Protection Clause analysis in Reagan v. Farmers’ Loan & Trust Co., 154 U.S. 362, 399 (1894). See generally John E. Fee, The Takings Clause as a Comparative Right, 76 S. Cal. L. Rev. 1003, 1003 (2003).

57 166 U.S. at 242-43.

58 211 U.S. 78, 91-99 (1908).
The historic documents usually examined in deciding how a right was rated before our Constitution was framed, such as the Magna Carta (1215) and the Petition of Right (1629), did not refer to the exemption from self-incrimination. Finally, of the 13 states that ratified the original Constitution, only four proposed amendments to add to the Constitution a privilege against self-incrimination. Thus, the Court held due process did not include a privilege against self-incrimination.59

In 1925, in *dicta*, the Court said in *Gitlow v. New York*60 that it assumed that the First Amendment freedom of speech and of the press are among the “fundamental” personal rights and liberties protected by the Due Process Clause of the 14th Amendment. The state statute involved in *Gitlow* regarding protest activities under a criminal syndicalism statute was nevertheless upheld, as the statute survived review under the First Amendment anyway. Two years later, in *Whitney v. California*,61 the Court squarely held that a state syndicalism statute had to be tested for First Amendment freedom of speech, association, and assembly principles under the Due Process Clause.

Five years later, in 1932, the Court concluded in *Powell v. Alabama*62 that a state’s denial of counsel to an accused in a capital case denied that individual due process of law, thus applying the Sixth Amendment right to counsel against the states. However, in 1937, the Court reach a different conclusion regarding the Fifth Amendment double jeopardy clause in *Palko v. Connecticut*.63 The Court noted that a right against double jeopardy was not generally available in Continental Europe, England, or states in the United States, and thus the right was not a fundamental aspect of ordered liberty that “a fair and enlightened system of justice would be impossible” without the right.

**C. The Holmesian Era: 1937-1954**

With respect to whether the protections given citizens by the Bill of Rights against the United States are applicable to the states through the 14th Amendment, a famous debate developed in the Holmesian era. In *Adamson v. California*,64 the judge and the prosecutor in a California criminal case commented on defendant's failure to testify. In a Holmesian-style opinion by Justice Reed, a 5-4 Court reaffirmed *Twining*’s holding that the 14th Amendment, intended to protect the right to a fair trial, did not draw within its scope the Fifth Amendment privilege against self-incrimination. In one dissent, Justice Black, joined by Justice Douglas, concluded that the framers of the 14th Amendment intended to make the entire Bill of Rights apply to the states. The legislative history

59  *Id.* at 99-114.

60  268 U.S. 652, 666 (1925).

61  274 U.S. 357, 646 (1927).

62  287 U.S. 45 (1932).

63  302 U.S. 319, 323-26 & n.3 (1937).

of the 14th Amendment, assembled in an appendix to Justice Black's opinion, was taken by him to show an intent to overrule Barron v. Baltimore by the Privileges or Immunities Clause and the Due Process Clause. Justice Murphy and Rutledge also dissented, agreeing with Justice Black that all of the Bill of Rights were embodied in the 14th Amendment. However, they insisted that the 14th Amendment was not limited to the Bill of Rights, but that other requirements were also essential for “fundamental” fairness “despite the absence of a specific provision in the Bill of Rights.”

Justice Frankfurter, a Holmesian, concurring with Justice Reed, disagreed with both sets of dissenters. Regarding Justice Black's "total incorporation" approach, Frankfurter said that persons familiar with political and legal history would not recognize the 14th Amendment as a cover for the various explicit provisions of the first eight Amendments. Regarding the "fundamental fairness" approach of Justices Murphy and Rutledge, Frankfurter said that judges were not intended to be able to roam at large to select what is indispensable to the dignity and happiness of a free man. He added that a safeguard against using the idiosyncrasies of personal judgment is to search for the “canons of decency and fairness which express the notions of justice of English-speaking peoples” that could indicate which of the Bill of Rights protections should be viewed as “selectively incorporated” into the 14th Amendment.

Although Justice Black's theory of “total incorporation” of the Bill of Rights never won the support of a majority of the Court, the “selective incorporation” approach, applied with instrumentalist predisposition to favored the unempowered, particularly in criminal procedural matters, ultimately resulted in almost all of the specific provisions of the Bill of Rights being incorporated into the meaning of "liberty" in the Due Process Clause of the 14th Amendment, as discussed next. In addition, certain additional due process rights have been declared fundamental, as discussed at § 25.1. Thus, the views of Justices Murphy and Rutledge ultimately prevailed on that issue.

D. The Instrumentalist Era: 1954-1986

With respect to incorporation of the Bill of Rights, an important summing-up occurred in 1968 in Duncan v. Louisiana. In Duncan, the Court followed the general reasoning suggested by Justice

65 Id. at 71-75, 92-120 (Black, J., joined by Douglas, J., dissenting) (particularly focusing on statements by Representative Bingham, the chief sponsor of the 14th Amendment). See generally John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1389-96 (1992) (discussing alternative theories regarding the 14th Amendment and incorporation).

66 Id. at 68 (Murphy, J., joined by Rutledge, J., dissenting).

67 Id. at 67-68 (Frankfurter, J., concurring). Under this approach, the Court incorporated the Sixth Amendment right to a public trial in criminal cases in In re Oliver, 333 U.S. 257, 271-73 (1948), and the Fourth Amendment prohibition of unreasonable searches and seizures, and probable cause to arrest requirement, in Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

Frankfurter in his *Adamson* concurrence. However, whereas Justice Frankfurter inquired into whether a particular procedural safeguard was required by the Anglo-American tradition, the Court in *Duncan* said that the relevant question is what is fundamental in the United States, processes heavily influenced, of course, and mandated for the federal government, by the Bill of Rights. Thus, instead of the focus in *Palko* in 1936 on fundamental traditions jointly held by Continental Europe, England, and the United States, or Justice Frankfurter’s focus in *Adamson* in 1947 on traditions of England and the United States (“the tradition of English-speaking peoples”), the focus in 1968 under *Duncan* was merely whether a right was part of “our” (the United States) tradition on rights.

Given this bias towards incorporation, since the Bill of Rights is “our” tradition of rights, the Court held in *Duncan* that the right to have a jury trial for serious crimes in the Sixth Amendment should be applied to the states. Crimes carrying possible penalties of up to six months could be regarded as petty. Not so, any crime subject to punishment of up to two years imprisonment, such as the one involved in *Duncan*. Justice Harlan, dissenting with Justice Stewart, both conservative Holmesians, rejected the majority's methodology of selective incorporation, saying that it tended to put the states in a straightjacket. They favored an evolving concept of fundamental fairness that took account more of the conservative preference for states’ rights and tolerance for experimentation.

Consistent with the instrumentalist reasoning articulated in *Duncan*, many other provisions of the Bill of Rights were listed in *Duncan* that had already been incorporated between 1961-1968, often over the dissents of Holmesian Justices remaining on the Court. These included the Fourth Amendment ban's on using evidence seized in violation of the Fourth Amendment requirement of reasonable searches and seizures, and probable cause to arrest; the Fifth Amendment privilege against self-incrimination, overruling *Twining* and *Adamson*; and the Sixth Amendment, with respect to a speedy trial, the confrontation of witnesses, and the right to counsel. Based on the approach

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69 *Id.* at 161-62.

70 *Id.* at 173-78 (Harlan, J., joined by Stewart, J., dissenting).

laid out in *Duncan*, the Court overruled *Palko v. Connecticut* in 1969 in *Benton v. Maryland*,\(^\text{72}\) and thereby incorporated the Fifth Amendment prohibition on "double jeopardy." Two years later, in 1971, the Court incorporated the Eighth Amendment ban on "excessive bail" in *Schilb v. Kuebel*.\(^\text{73}\) The Eighth Amendment ban on cruel and unusual punishment was incorporated in 1972 in *Furman v. Georgia*, although the Court had assumed it was incorporated as early as 1965 in *Robinson v. California*.\(^\text{74}\) Indeed, by the end of the instrumentalist era, the only provisions of the first eight Amendments not explicitly incorporated into the 14th Amendment were the Second Amendment dealing with the right to keep and bear arms, the Third Amendment provision regarding quartering soldiers in homes, the Fifth Amendment's requirement of a grand jury indictment, the Seventh Amendment’s right to a jury trial in civil cases, and the Eighth Amendment’s ban on excessive fines.

### 2. Selective Incorporation and the Modern Natural Law Era: 1986-Today

The Court held in 1989 in *Browning-Ferris Industries v. Kelco Disposal, Inc*\(^\text{75}\) that the Eighth Amendment's ban on "excessive fines" is a reference to criminal cases and does not apply to punitive damages awards in cases between private parties. The Court’s concern with excessive punitive damage awards, however, led the Court to place due process limits on punitive damages awards in state and federal civil cases in *BMW v. Gore* and other such cases, addressed at § 17.4. Given this concern with excessive punitive damages awards, and the fact that the Eighth Amendment ban on excessive bail was unanimously viewed as “fundamental” in *Schilb*, discussed above, it is likely that the Eighth Amendment ban on excessive fines in criminal cases would be viewed as “fundamental” and incorporated against the states if a case ever raised that issue for review.

Based on the approach laid out in *Duncan*, a 5-4 Court incorporated the Second Amendment in *McDonald v. City of Chicago*,\(^\text{76}\) excerpted below. Regarding the Third Amendment, the Supreme Court has never considered a case, but the Second Circuit Court of Appeals has concluded that the Third Amendment limitation on quartering soldiers in homes should be viewed as incorporated.\(^\text{77}\)


\(^{73}\) 404 U.S. 357, 365 (1971) (unanimous on the issue of incorporation).


\(^{75}\) 492 U.S. 257, 259-60 (1989).

\(^{76}\) 130 S. Ct. 3020 (2010). *Id.* at 3088 (Stevens, J., dissenting); *id.* at 3120 (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting).

\(^{77}\) Engblom v. Carey, 572 F. Supp. 44 (S.D.N.Y. 1983), aff’d, 724 F.2d 28 (2nd Cir. 1983) (Third Amendment claim stated by prison officers who were displaced from rented quarters in the prison by state military and law enforcement officers during a state-wide correction officers’ strike).
As a matter of deference to state procedural practices, probably the only two aspects of the Bill of Rights that are not “fundamental” today are the Fifth Amendment requirement of grand jury indictment, and the Seventh Amendment right to a jury trial. Thus, despite the Fifth Amendment, states are free to arrest an accused in various ways, such as by arraignment before a neutral magistrate, rather than by grand jury indictment, although roughly half the states have state constitutional provisions regarding grand jury indictment. Despite the Seventh Amendment, states can follow a practice of trying some factual issues to a court, rather than a jury, as addressed at § 16.3.4. This might not be true if the case were heard in federal court under diversity jurisdiction.

As a general proposition, the Court has stated that the Bill of Rights provisions apply equally against the states as they do against the federal government. Thus, in Malloy v. Hogan,\(^\text{78}\) the Court said it has “rejected the notion that the Fourteenth Amendment applies to the states only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’” On the other hand, two aspects of criminal defendants’ rights are applied differently against the states. First, the Court has held that states need not use 12-person juries in criminal cases, even though such juries are required in federal courts. As a consequence, for misdemeanor cases, such as traffic violation trials in municipal courts, many states use 6-person juries. A few states even provide for 6-person or 8-person juries in some or all noncapital felonies. Juries smaller than 6 persons are not permitted in any criminal case.\(^\text{79}\) Second, the Court has held that a unanimous jury verdict is not constitutionally required in state courts, even though unanimity is required in federal courts; state court juries can convict based on an 11-1, 10-2, or 9-3 vote. Unanimity is required for 6-person juries.\(^\text{80}\)

\(^{78}\) 378 U.S. 1, 10-11 (1964) (citations omitted).


\(^{80}\) See generally in Johnson v. Louisiana, 406 U.S. 356 (1972) (9-3 conviction upheld); Apodaca v. Oregon, 406 U.S. 404 (1972) (10-2 conviction upheld); Burch v. Louisiana, 441 U.S. 130 (1979) (unanimity required for 6-person juries); Kate Riordan, Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation after McDonald, 101 J. Crim. L. & Criminology 1403, 1404-06 (2011) (while only Louisiana and Oregon have such general non-unanimous verdict provisions as of 2011, proposals have been made in many states to depart from the unanimity requirement). In Oklahoma, under Okla. Const. Art. 2, § 19, if imprisonment cannot be for more than 6 months, a 9-3 vote can convict. While in Florida, after unanimous conviction for a death penalty crime, the death penalty could be imposed by a simply majority, see Chenyu Wang, Rearguing Jury Unanimity: An Alternative, 16 Lewis & Clark L. Rev. 389, 404-08 (2012), that changed in 2016, when a 5-2 Florida Supreme Court held in Hurst v. State, 202 So. 3d 40 (Fla. 2016), that unanimity is required before the death penalty can be imposed.
McDonald v. City of Chicago  
130 S. Ct. 3020 (2010)

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, III-A, and III-B, in which THE CHIEF JUSTICE, Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, and an opinion with respect to Parts II-C, IV, and V, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join.

Two years ago, in District of Columbia v. Heller, 554 U.S. 570 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In Barron ex rel. Tiernan v. Mayor of Baltimore, [32 U.S. (7 Pet.)] 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was “of great importance” but “not of much difficulty.” Id., at 247. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. See also Lessee of Livingston v. Moore, [32 U.S. (7 Pet.)] 469, 551-552 (1833) (“[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states”).

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge “the privileges or immunities of citizens of the United States” or deprive “any person of life, liberty, or property, without due process of law.”

Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to “the privileges or immunities of citizens of the United States.” The Slaughter-House Cases, [83 U.S. 36 (1873)], involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.” Id., at 79. The Court held that other fundamental rights – rights that predated the creation of the Federal Government and that “the State governments were created to establish and secure” – were not protected by the Clause. Id., at 76.

In drawing a sharp distinction between the rights of federal and state citizenship, the Court relied on two principal arguments. First, the Court emphasized that the Fourteenth Amendment's Privileges
or Immunities Clause spoke of “the privileges or immunities of citizens of the United States,” and the Court contrasted this phrasing with the wording in the first sentence of the Fourteenth Amendment and in the Privileges and Immunities Clause of Article IV, both of which refer to state citizenship. Second, the Court stated that a contrary reading would “radically change[ ] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people,” and the Court refused to conclude that such a change had been made “in the absence of language which expresses such a purpose too clearly to admit of doubt.” Id., at 78. Finding the phrase “privileges or immunities of citizens of the United States” lacking by this high standard, the Court reasoned that the phrase must mean something more limited.

Under the Court’s narrow reading, the Privileges or Immunities Clause protects such things as the right “to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a bonafide residence therein, with the same rights as other citizens of that State.” Id., at 79-80 (internal quotation marks omitted).


[Ed.: III-C: Not joined by Justice Thomas: “We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.”]

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111 (1884) (due process does not require grand jury indictment); Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (due process prohibits States from taking of private property for public use without just compensation) [overruling sub silentio Barron v. City of Baltimore].

The Court used different formulations in describing the boundaries of due process. For example, in Twining, the Court referred to “immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.” 211 U.S., at 102 (internal quotation marks omitted). In Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), the Court spoke of rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” And in Palko, the Court famously said that due process protects those rights that are “the very essence
of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.” 302 U.S., at 325.

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in *Betts* the Court held that, although the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the Due Process Clause required appointment of counsel in state criminal proceedings only where “want of counsel in [the] particular case . . . result[ed] in a conviction lacking in . . . fundamental fairness.” 316 U.S., at 473. Similarly, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that the “core of the Fourth Amendment” was implicit in the concept of ordered liberty and thus “enforceable against the States through the Due Process Clause” but that the exclusionary rule, which applied in federal cases, did not apply to the States. Id., at 27-28, 33.


The decisions during this time . . . made it clear that the governing standard is not whether any “civilized system [can] be imagined that would not accord the particular protection.” *Duncan*, 391 U.S., at 149, n.14. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. Id., at 149, and n.14; see also id., at 148 (referring to those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions” (emphasis added; internal quotation marks omitted)).

Finally, the Court abandoned “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,” stating that it would be “incongruous” to apply different standards “depending on whether the claim was asserted in a state or federal court.” *Malloy*, 378 U.S., at 10-11 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” Id., at 10.


[W]e now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. [W]e must decide whether the right to keep and bear
arms is fundamental to our scheme of ordered liberty, Duncan, 391 U.S., at 149, or as we have said in a related context, whether this right is “deeply rooted in this Nation's history and tradition,” Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

Our decision in Heller points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day and in Heller, we held that individual self-defense is “the central component” of the Second Amendment right. 128 S.Ct., at 2801-2802; see also id. at 2817 (stating that the “inherent right of self-defense has been central to the Second Amendment right”). Explaining that “the need for defense of self, family, and property is most acute” in the home, ibid., we found that this right applies to handguns because they are “the most preferred firearm in the nation to ‘keep’ and use for protection of one's home and family,” id. at 2818 (some internal quotation marks omitted); see also id., at 2817 (noting that handguns are “overwhelmingly chosen by American society for [the] lawful purpose” of self-defense); id., at 2818 (“[T]he American people have considered the handgun to be the quintessential self-defense weapon”). Thus, we concluded, citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense.” Id., at 2818.

Heller makes it clear that this right is “deeply rooted in this Nation's history and tradition.” Glucksberg, supra, at 721 (internal quotation marks omitted). Heller explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, 128 S.Ct., at 2797-2798, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was “one of the fundamental rights of Englishmen,” id., at 2798.

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.” Heller, 128 S.Ct., at 2801 (citing Letters from the Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed.1981)); see also Federal Farmer: An Additional Number of Letters to the Republican, Letter XVIII (Jan. 25, 1788), in 17 Documentary History of the Ratification of the Constitution 360, 362-363 (J. Kaminski & G. Saladino eds.1995); S. Halbrook, The Founders' Second Amendment 171-278 (2008). Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution's assignment of only limited powers to the Federal Government. Heller, supra, at 2801-2802; cf. The Federalist No. 46, p. 296 (C. Rossiter ed. 1961) (J. Madison). Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. See Levy 143-149; J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 155–164 (1994). But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution. See 1 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 327–331 (2d ed. 1854); 3 id. at 657-661; 4 id., at 242-246, 248-249; see also Levy 26-34; A. Kelly & W. Harbison, The American Constitution: Its Origins and Development 110, 118 (7th ed.1991). This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.
This understanding persisted in the years immediately following the ratification of the Bill of Rights. In addition to the four States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820. Heller, supra, at 2802-2804. Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as “the true palladium of liberty” and explained that prohibitions on the right would place liberty “on the brink of destruction.” 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1803); see also W. Rawle, A View of the Constitution of the United States of America, 125-126 (2d ed. 1829) (reprint 2009); 3 J. Story, Commentaries on the Constitution of the United States § 1890, p. 746 (1833) (“The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them”).

By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights – the fear that the National Government would disarm the universal militia – had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense. See M. Doubler, Civilian in Peace, Soldier in War 87-90 (2003); Amar, Bill of Rights 258-259. Abolitionist authors wrote in support of the right. See L. Spooner, The Unconstitutionality of Slavery 66 (1860) (reprint 1965); J. Tiffany, A Treatise on the Unconstitutionality of American Slavery 117–118 (1849) (reprint 1969). And when attempts were made to disarm “Free-Soilers” in “Bloody Kansas,” Senator Charles Sumner, who later played a leading role in the adoption of the Fourteenth Amendment, proclaimed that “[n]ever was [the rifle] more needed in just self-defense than now in Kansas.” The Crime Against Kansas: The Apologies for the Crime: The True Remedy, Speech of Hon. Charles Sumner in the Senate of the United States 64-65 (1856). Indeed, the 1856 Republican Party Platform protested that in Kansas the constitutional rights of the people had been “fraudulently and violently taken from them” and the “right of the people to keep and bear arms” had been “infringed.” National Party Platforms 1840-1972, p. 27 (5th ed.1973).

The most explicit evidence of Congress' aim appears in § 14 of the Freedmen's Bureau Act of 1866, which provided that “the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery.” 14 Stat. 176-177 (emphasis added). Section 14 thus explicitly guaranteed that “all the citizens,” black and white, would have “the constitutional right to bear arms.”

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms.

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a
constitutional amendment was necessary to provide full protection for the rights of blacks. Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. See General Building Contractors Assn., Inc. v. Pennsylvania, 458 U.S. 375, 389 (1982); see also Amar, Bill of Rights 187; Calabresi, Two Cheers for Professor Balkin's Originalism, 103 Nw. U.L.Rev. 663, 669-670 (2009).

In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three “indispensable” “safeguards of liberty under our form of Government.” 39th Cong. Globe 1182. One of these, he said, was the right to keep and bear arms: “Every man . . . should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete.” Ibid.

Even those who thought the Fourteenth Amendment unnecessary believed that blacks, as citizens, “have equal right to protection, and to keep and bear arms for self-defense.” Id., at 1073 (Sen. James Nye); see also Foner 258-259.

Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental. In an 1868 speech addressing the disarmament of freedmen, Representative [Thaddeus] Stevens emphasized the necessity of the right: “Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.” “The fourteenth amendment, now so happily adopted, settles the whole question.” Cong. Globe, 40th Cong., 2d Sess., 1967.

Justice STEVENS, dissenting.

While I agree with the Court that our substantive due process cases offer a principled basis for holding that petitioners have a constitutional right to possess a usable firearm in the home, I am ultimately persuaded that a better reading of our case law supports the city of Chicago. I would not foreclose the possibility that a particular plaintiff—say, an elderly widow who lives in a dangerous neighborhood and does not have the strength to operate a long gun—may have a cognizable liberty interest in possessing a handgun. But I cannot accept petitioners' broader submission. A number of factors, taken together, lead me to this conclusion.

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is far from hypothetical, for gun crime has devastated many of our communities. Amici calculate that approximately one million Americans have been wounded or killed by gunfire in the last decade. Urban areas such as Chicago suffer disproportionately from this epidemic of violence. Handguns
contribute disproportionately to it. Just as some homeowners may prefer handguns because of their small size, light weight, and ease of operation, some criminals will value them for the same reasons. See Heller, 128 S.Ct., at 2864-2865 (Breyer, J., dissenting). In recent years, handguns were reportedly used in more than four-fifths of firearm murders and more than half of all murders nationwide.

Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day – assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief – it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.

The practical impact of various gun-control measures may be highly controversial, but this basic insight should not be. The idea that deadly weapons pose a distinctive threat to the social order—and that reasonable restrictions on their usage therefore impose an acceptable burden on one's personal liberty—is as old as the Republic. As the Chief Justice observed just the other day, it is a foundational premise of modern government that the State holds a monopoly on legitimate violence: “A basic step in organizing a civilized society is to take [the] sword out of private hands and turn it over to an organized government, acting on behalf of all the people.” Robertson v. United States ex rel. Watson, 130 S.Ct. 2184 (dissenting opinion). The same holds true for the handgun. The power a man has in the state of nature “of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up,” to a significant extent, “to be regulated by laws made by the society.” J. Locke, Second Treatise of Civil Government § 129, p. 64 (J. Gough ed.1947).

[The Second Amendment differs in kind from the Amendments that surround it, with the consequence that its inclusion in the Bill of Rights is not merely unhelpful but positively harmful to petitioners' claim. Generally, the inclusion of a liberty interest in the Bill of Rights points toward the conclusion that it is of fundamental significance and ought to be enforceable against the States. But the Second Amendment plays a peculiar role within the Bill [of Rights], as announced by its peculiar opening clause. [Ed.: The full text of the Second Amendment provides: “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.”] Even accepting the Heller Court's view that the Amendment protects an individual right to keep and bear arms disconnected from militia service, it remains undeniable that “the purpose for which the right was codified” was “to prevent elimination of the militia.” Heller, 128 S.Ct., at 2801; see also United States v. Miller, 307 U.S. 174, 178 (1939) (Second Amendment was enacted “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces”). It was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. Notwithstanding the Heller Court's efforts to write the Second
Amendment's preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government.

The Second Amendment, in other words, “is a federalism provision,” Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 45 (2004 (Thomas, J., concurring in judgment). It is directed at preserving the autonomy of the sovereign States, and its logic therefore “resists” incorporation by a federal court against the States. Ibid. No one suggests that the Tenth Amendment, which provides that powers not given to the Federal Government remain with “the States,” applies to the States; such a reading would border on incoherent, given that the Tenth Amendment exists (in significant part) to safeguard the vitality of state governance. The Second Amendment is no different.

The Court is surely correct that Americans' conceptions of the Second Amendment right evolved over time in a more individualistic direction; that Members of the Reconstruction Congress were urgently concerned about the safety of the newly freed slaves; and that some Members believed that, following ratification of the Fourteenth Amendment, the Second Amendment would apply to the States. But it is a giant leap from these data points to the conclusion that the Fourteenth Amendment “incorporated” the Second Amendment as a matter of original meaning or postenactment interpretation. Consider, for example, that the text of the Fourteenth Amendment says nothing about the Second Amendment or firearms; that there is substantial evidence to suggest that, when the Reconstruction Congress enacted measures to ensure newly freed slaves and Union sympathizers in the South enjoyed the right to possess firearms, it was motivated by antidiscrimination and equality concerns rather than arms-bearing concerns per se; that many contemporaneous courts and commentators did not understand the Fourteenth Amendment to have had an “incorporating” effect; and that the States heavily regulated the right to keep and bear arms both before and after the Amendment's passage. The Court's narrative largely elides these facts. The complications they raise show why even the most dogged historical inquiry into the “fundamentality” of the Second Amendment right (or any other) necessarily entails judicial judgment – and therefore judicial discretion – every step of the way.

Justice BREYER, with whom Justice GINSBURG and Justice SOTOMAYOR join, dissenting.

I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as “fundamental” insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes. Nor can I find any justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government. I therefore conclude that the Fourteenth Amendment does not “incorporate” the Second Amendment's right “to keep and bear Arms.” And I consequently dissent.

In my view, taking Heller as a given, the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense. Under this Court's precedents, to incorporate the private self-defense right the majority must show that the right is, e.g., “fundamental to the American scheme of justice,” Duncan v. Louisiana, 391 U.S. 145, 149 (1968);
How do these considerations apply here? For one thing, I would apply them only to the private self-defense right directly at issue. After all, the Amendment's militia-related purpose is primarily to protect States from federal regulation, not to protect individuals from militia-related regulation. Heller, 128 S.Ct., at 2801-2802; Miller, 307 U.S., at 178. Moreover, the Civil War Amendments, the electoral process, the courts, and numerous other institutions today help to safeguard the States and the people from any serious threat of federal tyranny. How are state militias additionally necessary? It is difficult to see how a right that, as the majority concedes, has “largely faded as a popular concern” could possibly be so fundamental that it would warrant incorporation through the Fourteenth Amendment. Hence, the incorporation of the Second Amendment cannot be based on the militia-related aspect of what Heller found to be more extensive Second Amendment rights.

For another thing, as Heller concedes, the private self-defense right that the Court would incorporate has nothing to do with “the reason” the Framers “codified” the right to keep and bear arms “in a written Constitution.” 128 S.Ct., at 2801-2802 (emphasis added). Heller immediately adds that the self-defense right was nonetheless “the central component of the right.” Ibid. In my view, this is the historical equivalent of a claim that water runs uphill. But, taking it as valid, the Framers' basic reasons for including language in the Constitution would nonetheless seem more pertinent (in deciding about the contemporary importance of a right) than the particular scope 17th- or 18th-century listeners would have then assigned to the words they used. And examination of the Framers' motivation tells us they did not think the private armed self-defense right was of paramount importance. See Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1164 (1991) (“[T]o see the [Second] Amendment as primarily concerned with an individual right to hunt, or protect one's home,” would be “like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge”).

Further, there is no popular consensus that the private self-defense right described in Heller is fundamental. The plurality suggests that two amici briefs filed in the case show such a consensus, but, of course, numerous amici briefs have been filed opposing incorporation as well. Moreover, every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation. Much of this disagreement rests upon empirical considerations. One side believes the right essential to protect the lives of those attacked in the home; the other side believes it essential to regulate the right in order to protect the lives of others attacked with guns. It seems unlikely that definitive evidence will develop one way or the other. And the appropriate level of firearm regulation has thus long been, and continues to be, a hotly contested matter of political debate. See, e.g., Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 Harv. L. Rev. 191, 201-246 (2008).

Moreover, there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective. We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting “discrete and insular minorities.” Carolene Products Co., supra, at 153, n.4. Nor will incorporation help to assure equal respect for
individuals. Unlike the First Amendment's rights of free speech, free press, assembly, and petition, the private self-defense right does not comprise a necessary part of the democratic process that the Constitution seeks to establish. See, e.g., Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Unlike the First Amendment's religious protections, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth and Sixth Amendments' insistence upon fair criminal procedure, and the Eighth Amendment's protection against cruel and unusual punishments, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority. Unlike the protections offered by many of these same Amendments, it does not involve matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation. And, unlike the Fifth Amendment's insistence on just compensation, it does not involve a matter where a majority might unfairly seize for itself property belonging to a minority.

[I]ncorporation of the right will work a significant disruption in the constitutional allocation of decisionmaking authority, thereby interfering with the Constitution's ability to further its objectives.

First, on any reasonable accounting, the incorporation of the right recognized in Heller would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government. Private gun regulation is the quintessential exercise of a State's "police power" – i.e., the power to "protec[t] . . . the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State," by enacting "all kinds of restraints and burdens" on both "persons and property." Slaughter–House Cases, 16 Wall. 36 (1873) (internal quotation marks omitted). The Court has long recognized that the Constitution grants the States special authority to enact laws pursuant to this power. See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (noting that States have "great latitude" to use their police powers (internal quotation marks omitted)); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985). A decade ago, we wrote that there is "no better example of the police power" than "the suppression of violent crime." United States v. Morrison, 529 U.S. 598, 618 (2000). And examples in which the Court has deferred to state legislative judgments in respect to the exercise of the police power are legion. See, e.g., Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (assisted suicide); Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (same); Berman v. Parker, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless . . .").

In sum, the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation. Where the incorporation of other rights has been at issue, some of these problems have arisen. But in this instance all these problems are present, all at the same time, and all are likely to be present in most, perhaps nearly all, of the cases in which the constitutionality of a gun regulation is at issue. At the same time, the important factors that favor incorporation in other instances – e.g., the protection of broader constitutional objectives – are not present here. The upshot is that all factors militate against incorporation – with the possible exception of historical factors.
§ 14.4 Federal Common Law and Other Related Limits on State Power

1. Introduction to Federal Common Law

The ability of states to regulate certain areas may be affected by “federal common law.” Under Article III, § 1 of the Constitution, “The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.” Under Article III, § 2, cl. 1, “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution” and in other cases. At the time the Constitution was adopted, and consistent with a natural law understanding of judicial power, the term “Judicial Power” would have contemplated that the federal courts would have common law powers, including powers of both “law and equity,” similar to the common law power of state courts.81

The major difference between federal common law power and state common law power would have been that while state courts have general common law power, co-extensive with the state legislative power to legislate on any matter, the federal common law power was limited to those areas over which federal power existed. This is a consequence of the fact that the federal government is a government of limited powers. Federal judges' jurisdiction is limited to what Congress has granted, and Congress can grant only what the Constitution permits. In contrast, state governments have general legislative power, and state judges have general jurisdiction and power to make common law, as long as that law is consistent with federal and state statutory and constitutional law.82

For example, as St. George Tucker noted in his 1803 Annotated Edition of Blackstone's Commentaries:

In short, as the matters cognizable in the federal courts, belong . . . partly to the law of nations, partly to the common law of England; partly to the civil law; partly to the maritime law, comprehending the laws of Oleron and Rhodes; and partly to the general law and custom of merchants; and partly to the municipal laws of any foreign nation, or of any state in the union, where the cause of action may happen to arise, or where the suit may be instituted; so, the law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the lex loci, or law of the foreign nation, or state, in which the cause of action may arise, or shall be decided, must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively.83


With regard to which law should apply, the Rules of Decision Act, § 34 of the 1789 Judiciary Act, provided that “the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.” This Act reflected the general understanding that federal courts would follow the local law of the states in cases where it applied. For areas of unique federal control, the court would follow “general law,” that which “existed by common practice and consent among a number of sovereigns.” As an example, with regard to the law of marine insurance, federal courts felt free to develop a general law of marine insurance, irrespective of local law on the subject, even when sitting in diversity cases.84

In 1842, the Supreme Court held in *Swift v. Tyson* that the Rules of Decision Act of 1789 did not preclude federal courts from also creating common law in areas outside special areas of federal control, like maritime law. The Court said that the Act was limited to statutory law, and, therefore, did not include common law created by state courts. After *Swift*, federal courts created what came to be known as “general law” or "federal general common law" to govern diversity cases involving, among other things, contract and commercial law.85 This let the federal courts develop more pro-business friendly contract and commercial law for diversity cases than existed in some state courts.

This understanding of “federal general common law” came to an end in 1938. Reflecting the Holmesian deference-to-government positivist perspective on the law, where law derives from positive acts of the sovereign, the Supreme Court stated in 1938 in *Erie Railroad Co. v. Tompkins*86 that there is "no federal general common law." The Court noted in *Erie* that the common law of contracts, torts, or otherwise derives not from some natural law “brooding omniscience in the sky,” acknowledged by all civilized men throughout the world, but rather from sovereign entities. Since states are the appropriate sovereign entities for purposes of state common law, state common law should be applied in such state cases that are in federal court pursuant to diversity jurisdiction. As for which state law would apply, the answer derives, as it would for such cases if heard in state courts, from general choice of law principles. While those principles were more categorical before 1937, based more exclusively on physical presence in the state, a balancing test is typically used today to determine which state has the most significant relationship to the transaction, based on such factors as the locus of the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.87

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84 Id. at 1554-75.


86 304 U.S. 64, 78 (1938).

87 See Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Law*, 27 Vt. L. Rev. 1, 1-8, 17-18 (2002). For discussion of the various balancing tests in use by various states to determine choice of law issues, and an analysis that some of them should be viewed
Despite this rejection of “federal general common law” over state law matters in federal court for purposes of diversity jurisdiction, the Holmesian-era Court recognized the appropriateness, the need, and the authority for "federal common law" in areas where federal sovereignty was present.88 This understanding of federal common law has been followed by the Supreme Court during the instrumentalist and modern natural law era. The Supreme Court summed up the doctrine in 1981 in *Texas Industries, Inc. v. Radcliff Materials*:

> These instances are "few and restricted," and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and those in which Congress has given the courts the power to develop substantive law.

The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.89

2. **Areas of Uniquely Federal Interest**

One area of federal common law concerns the rights and duties of the United States on the commercial paper/money which it issues. The Court has acknowledged a strong interest in having those rights governed by a rule uniform across the Nation. In terms of the content of federal law, the Court noted in *Clearfield Trust Co. v. United States*,90 “[W]hile the federal law merchant developed for about a century under the regime of *Swift v. Tyson* represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules” regarding commercial paper.


A second area of federal common law applies to contracts entered into by parties with the federal government. Where no federal statute or administrative regulation governs the issue before the court, the Supreme Court has stated that the interests of uniformity require there be one law applicable to federal contracts, rather than federal contracts being governed by 50 different state standards depending on the location of contract performance, as in *United States v. Seckinger*.91

A third area where the Court has been willing to have “federal common law” displace otherwise governing state law has been in the federal acquisition of property within a state. Thus, in *United States v. Little Lake Misere Land Co.*,92 the Court noted that the right of the United States to seek legal redress for proprietary transactions is a federal right, so that the courts of the United States may formulate a rule of decision according to their own standards.

The Supreme Court has consistently held that cases involving boundary disputes and other matters of resolving the conflicting rights of states are governed by federal common law. Many of these cases come to the Supreme Court under the Court’s original jurisdiction for cases involving states versus states.93 Other cases, however, even if not directly involving boundary disputes, are handled in the same fashion. As the Court noted in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,94 "Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions."

Cases involving international relations, not governed directly by the federal Constitution, statutes, or treaties, are also an area of federal common law. As the Court noted in *Banco Nacional de Cuba v. Sabbatino*,95 “[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.” In addition, Article I, § 8, cl. 10 grants to Congress the power, among other things, "[t]o define and punish . . . Offenses against the Law of Nations . . . ." This clause grants Congress power to incorporate international law into federal law, even when such norms infringe upon areas otherwise regulated by the states.96 Further, as the Court noted in *Sosa v.*

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94 304 U.S. 92, 110 (1938).


\textit{Alvarez-Machain},\textsuperscript{97} where Congress has passed a jurisdictional statute, such as the Alien Tort Claims Act, which creates on its own no new causes of action, the reasonable inference is that the statute was intended to have effect the moment it became law and the common law would provide some causes of action for international law violations with a potential for personal liability. The \textit{Sosa} Court noted that no development in the last two centuries has categorically precluded federal courts from “recognizing a claim under the law of nations as an element of common law.” Nevertheless, there are “good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind . . . . [C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”

This notion of federal common law also applies to cases involving the propriety rights of Native Americans,\textsuperscript{98} and questions such as the role of the federal judiciary in determining the proper extent of jurisdiction of state courts over aliens.\textsuperscript{99}

A special area of federal common law concerns cases involving admiralty and maritime jurisdiction. As has been noted, general maritime law is probably the oldest body of federal common law.\textsuperscript{100} During the original natural law era, the Supreme Court noted in \textit{American Ins. Co. v. 356 Bales of Cotton},\textsuperscript{101} “A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases 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.” Similarly, during the formalist era, in \textit{Southern Pacific Co. v. Jensen},\textsuperscript{102} the Court said that “in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.” Federal admiralty law thus displaces state law that “works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”


\textsuperscript{98} \textit{See, e.g.}, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985).


\textsuperscript{100} Zicherman v. Korean Air Lines Co., 43 F.3d 18, 21 (2d Cir. 1994).

\textsuperscript{101} 26 U.S. (1 Pet.) 511, 545-46 (1828).

\textsuperscript{102} 244 U.S. 205, 215-16 (1917).
Since 1937, consistent with the focus in *Erie* on federal and state sovereign interests, and the “restricted” nature federal common law, in the language of the 1981 *Texas Industries* case, cited at § 14.4.1 n.89, greater attention has been paid in admiralty and maritime law to congressional statutes and state rights. Thus, much modern admiralty law is an elaboration of various congressional statutes, such as the Carriage of Goods by Sea Act, the Jones Act, the Death on the High Seas Act, the Longshore and Harbor Workers' Compensation Act, the Outer Continental Shelf Lands Act, and other such statutes.\(^\text{103}\) With regard to the extent of preemption of state law in this area, commentators have worked to limit the broad language of the 1917 *Jensen* opinion.\(^\text{104}\) So have some Circuit Courts of Appeals. For example, the Court of Appeals for the Fifth Circuit has tried to refine the *Jensen* test into more workable criteria. As that case has been summarized:

(1) "state law is not preempted when it contains a detailed scheme to fill a gap in maritime law";
(2) "state law is not preempted when the law regulates behavior in which the state has an especially strong interest";
(3) "maritime law preempts [state law] whenever a uniform rule will facilitate maritime commerce, or, conversely, when non-uniform regulation will work a material disadvantage to commercial actors";
(4) "maritime law preempts state law when the state law impinges upon international or interstate relations";
(5) the final factor, which the court admitted to be stated "badly"[actually “badly” in the Fifth Circuit’s opinion] is "that plaintiff should win personal injury or death maritime tort claims." While far from perfect, this approach lends itself more towards balancing state interests with the interests that ultimately underlie the need for federal maritime law.\(^\text{105}\)

3. **Congressionally Granted Power to Courts to Develop Law Binding States**

The first two sections of the Sherman Act, 15 U.S.C. §§ 1, 2, forbid, in part, "Every contract, combination . . ., or conspiracy, in restraint of trade" and "monopoliz [ing], or attempt[ing] to monopolize, . . . any part of the trade or commerce." The Court noted in *National Society of Professional Engineers v. United States*,\(^\text{106}\) "Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition [including] the existing law of monopolies and restraints on trade."


Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law. For example, in *Textile Workers v. Lincoln Mills*, the Court read § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), not only as granting jurisdiction over defined areas of labor law, but also as vesting in the courts the power to develop a common law of labor-management relations within that jurisdiction.

Another kind of congressionally authorized federal common law occurs when Congress incorporates by reference non-federal law as part of the statutory criteria. One circumstance where such incorporation may apply concerns applicable statute of limitations under various federal statutes, including § 1983 actions. As a general matter, it has been noted: “[T]he Court has often found that Congress intended to refer federal courts to long-standing common-law principles, thereby creating a species of federal common law in the process of statutory interpretation [discussing the term “domicile” under the Indian Child Welfare Act of 1978 and the term “burglary” under the Career Criminals Amendment Act of 1986].”

In addition, the Supreme Court has long defined "inherent powers" as those which "cannot be dispensed with . . . because they are necessary to the exercise of all others." It has identified some examples, such as managing litigation, imposing sanctions, and supervising the administration of criminal justice. Federal trial courts have used this docket-management power to employ various pressure tactics, such encouraging settlements, ordering litigants to submit to summary jury trials, exercising discretion over sanctioning, and discretionary assessment of attorney’s fees. Federal judges have justified such applications of inherent authority by references to Article III, traditional equitable or common law practices, efficiency, prudence, or separation of powers. Sometimes these powers have been “abused throughout history, especially against those perceived as socially threatening (e.g., labor leaders, Communists, and civil rights activists).”

4. Federal Authority Limiting States Rights’ Under the 21st First Amendment

The 18th Amendment, ratified in 1919, brought prohibition to the United States and its territories. It provided: "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." By 1933, that social experiment was judged a failure, and the 18th Amendment was repealed through the ratification of the 21st Amendment.

The 21st Amendment, read literally, appears to give each state virtually complete control over whether to permit the importation or sale of liquor within its territory, whether to allow liquor manufacture, and how to structure any distribution system. After repealing the 18th Amendment in § 1 of the 21st Amendment, § 2 of the 21st Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is prohibited." That being so, the Amendment appears to eliminate any negative implications from the dormant commerce clause. The Court has held, though, that although the 21st Amendment gives authority to the states that might otherwise be reserved to the federal government, the 21st Amendment places no limit on other constitutional provisions, including the dormant commerce clause, or regulations of commercial speech involving liquor sales under the First Amendment, as in 44 Liquormart, Inc. v. Rhode Island,113 or other clauses of the Constitution, including the Import/Export Clause, the Establishment Clause, the Equal Protection Clause, and the Due Process Clause.114

Since the 21st Amendment does not entirely deprive Congress of an ability to regulate interstate commerce in liquor under the Commerce Clause, the Court has several times decided a particular state law was preempted by federal law.115 Despite such cases, states still have substantial control over whether to permit importation or sale of liquor and how to structure the distribution system. Thus, a state can apply its registration and labeling requirements to imported liquor destined for United States military bases because the state laws, enacted to promote temperance and ensuring orderly marketing, fall within the core of state power under the 21st Amendment and do not discriminate against the United States.116


114 See Granholm v. Heald, 544 U.S. 460, 486-87 (2005), and cases cited therein.


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§ 15.1 Introduction to State Action Doctrine

1. Basic Doctrinal Structure

With the exception of the 13th Amendment’s ban on slavery or involuntary servitude, addressed at § 16.4.2, other individual rights protected by the Constitution are protected only against government infringement, not infringement by private actors. This is indicated by the literal text of most constitutional provisions. For example, the First Amendment provides, “Congress shall make no law abridging the freedom of speech.” The 14th Amendment provides, “No State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person equal protection of the laws.” Thus, the Court held in 1883, in the Civil Rights Cases,¹ that the 14th Amendment does not bar the invasion of rights by individuals, but only authorizes courts and Congress to redress the operation of state laws and the actions of state officials that deprive people of federal rights. Even in the absence of literal text, other constitutional protections, like the Fifth Amendment protections against double jeopardy or self-incrimination, only make sense in the context of the government action of arrest and prosecution.

The Court summed up this aspect of individual rights protection in 2001 in Brentwood Academy v. Tennessee Secondary School Athletic Association, stating:

The judicial obligation is not only to “‘preserv[e] an area of individual freedom by limiting the reach of federal law’ and avoid[d] the imposition of responsibility on a State for conduct it could not control,” . . . but also to assure that constitutional standards are invoked “when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.”²


Where an individual is burdened by the operation of a state statute enforced by a state official, such as a district attorney or an administrative agency official, state action is naturally found. Where action is done purely by a private individual, such as an individual determining what speech will go on in the individual’s own home, state action is not found. The difficult cases involve circumstances involving actions that have elements of both state and private action. Summing up the Court’s state action cases in 2001, the Court noted in *Brentwood Academy*, “[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”

In deciding whether such a “close nexus” exists, the Court has considered a myriad of factors, and has used different terminology and tests at different times in order to determine whether state action exists. Despite the terminology of “state action,” the key question in each case is whether sufficient “government action” exists, so that either the individual rights protections involving federal action, like the original Bill of Rights, or individual rights protections involving state or local action, such as the 14th Amendment, can be said to apply. In all these cases of federal, state, or local action, the terminology and tests can be organized around three basic factors:

1. The extent to which the individual is performing an activity considered by the Court to be a “public function”;

2. The extent to which the case involves some aspect of “overt official involvement,” whether by operation of a federal, state, or local law; federal, state, or local executive or administrative agency action; or involvement by a federal, state, or local judge in judicial enforcement of a constitutional, statutory, or common-law right; and

3. The extent to which the individual and the government are “entangled” or “entwined,” the Court sometimes using the phrase “entanglement” and sometimes “entwinement” to reflect this factor, whether by (a) individual participation in “joint activity” with the government, either “overt or covert,” e.g., a joint venture, partnership, or conspiracy, or in some other way shared “management and control,” including government control through regulation “authorizing” the private activity; or (b) financial connections of support, such as direct grants or subsidies, or tax breaks, between the government and private actor; or (c) some symbiotic relationship between the two, so that the government has placed its “power, property, and prestige” behind the private activity, or in some other fashion has “encouraged” the activity to occur.

In 1982, the state action doctrine was phrased as a two-part test in *Lugar v. Edmondson Oil Co, Inc.* In that case, Justice White stated:

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3 *Id.* (citations omitted).

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a State official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.5

The second part of this test – may the person “fairly be said to be a state actor” – is determined by the three-factor analysis of state action stated above, focusing on “overt official involvement” of state “officials,” aspects of “entanglement/entwinement” in terms of “acting together” or “obtaining aid” from the state, and activity “otherwise chargeable to the State” because a “public function.” From an analytic perspective, the first part of this test turns out to be a truism, that to have a case in court you need to have a cause of action based on some rule of law, whether a constitutional provision, statute, or common-law right. Thus, this first part has not formed the basis for later decisions on state action, and case results since 1986 have been determined by the application of the three-factor state action analysis discussed above at § 15.1.1 n.4.

2. Variations in State Action Doctrine Among the Four Decisionmaking Styles

Differences among the four decisionmaking styles influence how, in practice, the Justices go about defining and applying each of these three factors: (1) public function; (2) overt official involvement; and (3) entanglement/entwinement. Because of their predisposition to protect the unpowered, instrumentalist Justices are the most likely to use these factors to find state action, triggering application of First Amendment free speech, Due Process, Equal Protection, and other individual rights protections. Because in these cases the challenge is literally to private action, formalist Justices are less likely to find state action because of their more literal, textualist approach. Equally rigorous in their approach to state action are conservative Holmesian Justices, like Chief Justice Rehnquist, whose predisposition towards judicial restraint means they do not want to reach out to find state action and decide cases on the merits.

In contrast, a more liberal Holmesian judge, like Justice White, is likely to share the liberal predisposition towards protecting civil/political rights, noted at § 1.1.4 text following note 20. That suggests a predisposition to find state action to permit enforceable remedies if, in the Holmesian phraseology, noted at § 1.1.2 n.9, the unconstitutionality is "so clear that it is not open to rational question." This variation among Holmesian judges is reflected in cases like *Marsh v. Alabama*,6 excerpted at § 15.2, with liberal Holmesian Justice Frankfurter joining in the majority with liberal formalist Justice Black and liberal instrumentalist Justices Douglas, Rutledge and Murphy, while conservative Holmesians Chief Justice Vinson, and Justices Reed and Burton, were in the dissent.

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6 326 U.S. 501, 501 (1946) (Black, J., opinion for the Court); *id.* at 510 (Frankfurter, J., concurring); *id.* at 513-17 (Vinson, C.J., joined by Reed & Burton, JJ., dissenting).
Natural law Justices fall in the middle between the two extremes, without a strong predisposition either in favor or against finding state action. For them, slight variations in the strength of the various factors can cause private action either to be just barely “fairly attributable to the state” or just barely on the other side of the line and not quite there.

Regarding the precise phrasings of the state action tests, formalist and Holmesian Justices tend to adopt a higher burden to meet before a finding of state action. For example, as represented by Justice Rehnquist’s opinion in *Flagg Bros., Inc. v. Brooks*, a “public function” should only be found for activities “traditionally exclusively reserved to the states.” That approach differs from the traditional view, represented by Justice Kennedy’s opinion in *Edmonson v. Leesville Concrete Co., Inc.* that public function analysis involves “whether the actor is performing a traditional governmental function” with no requirement of “exclusivity.”

Regarding “overt official involvement,” as phrased by Justice Powell in dissent in *Lugar v. Edmondson Oil Co., Inc.*, the higher burden states that “where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered ‘state action’ within the meaning of our cases.” In contrast, the traditional view of Justice White’s majority opinion in *Lugar v. Edmondson Oil Co., Inc.* was that “invoking the aid of state officials to take advantage of state-created” procedures can contribute to a finding of state action.

Similarly, under a formalist and Holmesian approach, “entanglement/entwinement” is more likely to be found only where the state has literally compelled or coerced the act to occur, or the private party and the state are involved in a conspiracy or otherwise acted in a symbiotic relationship with the government. As stated in Justice Rehnquist’s opinion in *Flagg Bros. Inc. v. Brooks*, merely authorizing private action, setting up a legislative scheme for enforcement, or licensing the activity, should not be viewed as enough joint participation to lead to a finding of state action. The traditional view, as reflected in Justice Souter’s majority opinion in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, is that even these lesser activities, when cumulated together with other aspects of “overt official involvement” or “public function” involvement may be enough to constitute state action. As stated there, “Our cases have identified a host of facts that can bear on the fairness of such an attribution.”

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7 436 U.S. 149, 159 (1978) ((Rehnquist, J., for the Court).
8 500 U.S. 614, 621 (1991) (Kennedy, J., for the Court).
10 *Id.* at 942 (White, J., for the Court).
11 436 U.S. at 164 (Rehnquist, J., for the Court).
While occasionally a formalist or Holmesian Justice may implicitly suggest the state action doctrine embodies three elements to meet, requiring finding “public function,” “overt official involvement,” or “entanglement/entwinement” standing alone to support a finding of state action, the traditional requirement is that these are three factors to meet, and the Court should aggregate together any amount of “public function,” “overt official involvement,” or “entanglement/entwinement” to determine whether the private action is “fairly attributable to the state.”

A good example of the traditional approach is Edmonson v. Leesville Concrete Co., Inc.,15 excerpted at § 15.3. There, the Court noted that there is state action if the actor can fairly be deemed a state actor, considering any “governmental assistance and benefits” (entanglement/entwinement), whether a “traditional government function” is involved (public function), and whether the “incidents of governmental authority” serve to “aggravate” the injury (overt official involvement). All three factors were present in Edmonson, which included judicial involvement in the peremptory challenge part of the public function of picking a jury to resolve a private tort case, and where governmental assistance occurred in the form of a judicial summons to individuals for jury duty. In Edmonson, it was the cumulative effect of all three factors that led to the finding of state action. Similarly, in Evans v. Newton,16 excerpted at § 15.2, it was the combined effects of the “entwinement” of maintenance of a park, with aspects of a “public function,” since even private parks are “municipal in nature,” with prior “overt official involvement” of public trustees, that led to finding state action.

§ 15.2 Cases Predominantly Involving Public Function Analysis

Marsh v. Alabama
326 U.S. 501 (1946)

Justice BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town.


14 Id. at 360 (Douglas, J., dissenting) (criticizing Rehnquist’s opinion, noting, “It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.”). This is the traditional majority view, as reflected in cases discussed at § 15.1 nn.15-16.


The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a “business block” on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: “This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.” Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, Section 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution.

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. Under our decision in Lovell v. Griffin, 303 U.S. 444 [(1938)], and others which have followed that case, neither a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets can not be justified on the ground that the municipality holds legal title to them. Jamison v. Texas, 318 U.S. 413 [(1943)]. . . . Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.
We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a “business block” in the town and a street and sidewalk on that business block. Cf. Barney v. Keokuk, 94 U.S. 324, 340 (1876)]. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The “business block” serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. [FN 5: In the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23. The percentage varied from 9 per cent in Illinois and Indiana and 64 per cent in Kentucky, to almost 80 per cent in West Virginia. U.S. Coal Commission, Report, 1925, Part III, pp. 1467, 1469 summarized in Morris, The Plight of the Coal Miner, Philadelphia, 1934, Ch. VI, p. 86. The most recent statistics we found available are in Magnusson, Housing by Employers in the United States, Bureau of Labor Statistics Bulletin No. 263 (Misc. Ser.) p. 11. See also United States Department of Labor, Wage and Hour Division, Data on Pay Roll Deductions, Union Manufacturing Company, Union Point, Georgia, June 1941; Rhyne, Some Southern Cotton Mill Workers and Their Villages, Chapel Hill, 1930 (Study completed under the direction of the Institute for Research in Social Science at the University of North Carolina); Comment, Urban Redevelopment, 54 Yale L.J. 116]. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

Justice JACKSON took no part in the consideration or decision of this case.

Justice REED, joined by THE CHIEF JUSTICE and Justice BURTON, dissenting.

What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views.

Both Federal and Alabama law permit, so far as we are aware, company towns. By that we mean an area occupied by numerous houses, connected by passways, fenced or not, as the owners may choose. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-
scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of “orderly” is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech.

Terry v. Adams
345 U.S. 461 (1953)

Justice BLACK announced the judgment of the Court and an opinion in which Justice DOUGLAS and Justice BURTON join.

In Smith v. Allwright, 321 U.S. 649 [(1944)], we held that rules of the Democratic Party of Texas excluding Negroes from voting in the party's primaries violated the Fifteenth Amendment. While no state law directed such exclusion, our decision pointed out that many party activities were subject to considerable statutory control. This case raises questions concerning the constitutional power of a Texas county political organization called the Jaybird Democratic Association or Jaybird Party to exclude Negroes from its primaries on racial grounds. The Jaybirds deny that their racial exclusions violate the Fifteenth Amendment. They contend that the Amendment applies only to elections or primaries held under state regulation, that their association is not regulated by the state at all, and that it is not a political party but a self-governing voluntary club. The District Court held the Jaybird racial discriminations invalid and entered judgment accordingly. 90 F.Supp. 595. The Court of Appeals reversed, holding that there was no constitutional or congressional bar to the admitted discriminatory exclusion of Negroes because Jaybird's primaries were not to any extent state controlled. 193 F.2d 600. We granted certiorari. 344 U.S. 883.

The Jaybird Association or Party was organized in 1889. Its membership was then and always has been limited to white people; they are automatically members if their names appear on the official list of county voters. It has been run like other political parties with an executive committee named from the county's voting precincts. Expenses of the party are paid by the assessment of candidates for office in its primaries. Candidates for county offices submit their names to the Jaybird Committee in accordance with the normal practice followed by regular political parties all over the country. Advertisements and posters proclaim that these candidates are running subject to the action of the Jaybird primary. While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries they have nearly always done so and with few exceptions since 1889 have run and won without opposition in the Democratic primaries and the general elections that followed. Thus the party has been the dominant political group in the county since organization, having endorsed every county-wide official elected since 1889.
It is apparent that Jaybird activities follow a plan purposefully designed to exclude Negroes from voting and at the same time to escape the Fifteenth Amendment's command that the right of citizens to vote shall neither be denied nor abridged on account of race.

The District Court found that the Jaybird Association was a political organization or party; that the majority of white voters generally abide by the results of its primaries and support in the Democratic primaries the persons endorsed by the Jaybird primaries; and that the chief object of the Association has always been to deny Negroes any voice or part in the election of Fort Bend County officials.

The facts and findings bring this case squarely within the reasoning and holding of the Court of Appeals for the Fourth Circuit in its two recent decisions about excluding Negroes from Democratic primaries in South Carolina. Rice v. Elmore, 4 Cir., 165 F.2d 387, and Baskin v. Brown, 4 Cir., 174 F.2d 391. South Carolina had repealed every trace of statutory or constitutional control of the Democratic primaries. It did this in the hope that thereafter the Democratic Party or Democratic “Clubs” of South Carolina would be free to continue discriminatory practices against Negroes as voters. The contention there was that the Democratic “Clubs” were mere private groups; the contention here is that the Jaybird Association is a mere private group. The Court of Appeals in invalidating the South Carolina practices answered these formalistic arguments by holding that no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community. In doing so the Court relied on the principle announced in Smith v. Allwright, supra, 321 U.S. at page 664, that the constitutional right to be free from racial discrimination in voting “... is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.”

It is significant that precisely the same qualifications as those prescribed by Texas entitling electors to vote at county-operated primaries are adopted as the sole qualifications entitling electors to vote at the county-wide Jaybird primaries with a single proviso – Negroes are excluded. Everyone concedes that such a proviso in the county-operated primaries would be unconstitutional. The Jaybird Party thus brings into being and holds precisely the kind of election that the Fifteenth Amendment seeks to prevent. When it produces the equivalent of the prohibited election, the damage has been done.

The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids – strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.
Justice FRANKFURTER, concurring.

The State of Texas has entered into a comprehensive scheme of regulation of political primaries, including procedures by which election officials shall be chosen. The county election officials are thus clothed with the authority of the State to secure observance of the State's interest in “fair methods and a fair expression” of preferences in the selection of nominees. Cf. Waples v. Marrast, 184 S.W. 180, 183. If the Jaybird Association, although not a political party, is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme. Unlawful administration of a State statute fair on its face may be shown “by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself,” Snowden v. Hughes, 321 U.S. 1, 8; here, the county election officials aid in this subversion of the State's official scheme of which they are trustees, by helping as participants in the scheme.

This is not a case of occasional efforts to mass voting strength. Nor is this a case of boss-control, whether crudely or subtly exercised. Nor is this a case of spontaneous efforts by citizens to influence votes or even continued efforts by a fraction of the electorate in support of good government. This is a case in which county election officials have participated in and condoned a continued effort effectively to exclude Negroes from voting. Though the action of the Association as such may not be proscribed by the Fifteenth Amendment, its role in the entire scheme to subvert the operation of the official primary brings it “within reach of the law. . . .[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful.” Mr. Justice Holmes, speaking for the Court, in Swift and Company v. United States, 196 U.S. 375, 396.

Justice CLARK, with whom the CHIEF JUSTICE, Justice REED, and Justice JACKSON join, concurring.

We agree with Chief District Judge Kennery that the Jaybird Democratic Association is a political party whose activities fall within the Fifteenth Amendment's self-executing ban. Not every private club, association or league organized to influence public candidacies or political action must conform to the Constitution's restrictions on political parties. Certainly a large area of freedom permits peaceful assembly and concerted private action for political purposes to be exercised separately by white and colored citizens alike. More, however, is involved here.

Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization, selecting its nominees and using its machinery for carrying out an admitted design of destroying the weight and effect of Negro ballots in Fort Bend County. To be sure, the Democratic primary and the general election are nominally open to the colored elector. But his must be an empty vote case after the real decisions are made. And because the Jaybird-indorsed nominee meets no opposition in the Democratic primary, the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.
Justice MINTON, dissenting.

I am not concerned in the least as to what happens to the Jaybirds or their unworthy scheme. I am concerned about what this Court says is state action within the meaning of the Fifteenth Amendment to the Constitution. For, after all, this Court has power to redress a wrong under that Amendment only if the wrong is done by the State. That has been the holding of this Court since the earliest cases. The Chief Justice for a unanimous Court in the recent case of *Shelley v. Kraemer*, 334 U.S. 1, 13 [(1948)], stated the law as follows: “Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 [(1883)], the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”

This record will be searched in vain for one iota of state action sufficient to support an anemic inference that the Jaybird Association is in any way associated with or forms a part of or cooperates in any manner with the Democratic Party of the County or State, or with the State. It calls itself the Jaybird Democratic Association because its interest is only in the candidates of the Democratic Party in the county, a position understandable in Texas. It is a gratuitous assumption on the part of Mr. Justice Clark that: “Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization, selecting its nominees and using its machinery for carrying out an admitted design of destroying the weight and effect of Negro ballots in Fort Bend County.” The following stipulation in the record shows the unsubstantiality of that statement just quoted from Justice Clark's opinion. I quote the stipulation:

“There is no compulsion upon any person who receives the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, for a particular office, to run for that office or any other office. In the event such indorsee of the Association does desire to run for such office he may do so; but if he does so run for such office he must himself file his application with the Executive Chairman or Committee of the Democratic Party for the position on the Democratic Party ballot for the July primary of such Democratic Party, and must himself pay the fee as provided by law. Neither the Jaybird Democratic Association nor its Executive Committee files an application with the Democratic Party Executive Committee or Chairman that the Jaybird Democratic Association nominee be placed on the ballot for the Democratic Party July primary election. There is nothing on the ballot of the Democratic Party primary to indicate that any person appearing thereon does or does not have the indorsement of the Jaybird Democratic Association.

“The name of the applicant for a place on the Democratic Party ballot is not placed on said ballot unless he complies with the laws of the State of Texas, even though such applicant were indorsed by the Jaybird Democratic Association; and every qualified applicant who makes the required application to the Democratic Executive Committee and pays the requisite fee is placed on the Democratic Party primary ballot for the July Democratic primary though not indorsed by the Jaybird Democratic Association.
“No member of the Negro race, nor any other person qualified under the laws of the State of Texas to become a candidate, has been refused a place on the Democratic Party primary ballot for Fort Bend County, Texas, by the Democratic Party.”

So it seems to me clear there is no state action, and the Jaybird Democratic Association is in no sense a part of the Democratic Party. If it is a political organization, it has made no attempt to use the State, or the State to use it, to carry on its poll.

In this case the majority have found that this pressure group's work does constitute state action. The basis of this conclusion is rather difficult to ascertain. Apparently it derives mainly from a dislike of the goals of the Jaybird Association. I share that dislike. I fail to see how it makes state action. I would affirm.

_Terry v. Adams_ was part of a string of cases dealing with attempts to insulate “private” voting schemes from the 15th Amendment ban on racial discrimination in voting. During the formalist era in 1927, the Supreme Court held in _Nixon v. Herndon_ that a Texas statute excluding blacks from Democratic primaries was unconstitutional as race discrimination by the state. Similarly, in 1932, in _Nixon v. Condon_, a state law excluding blacks from a Democratic primary by the party's executive committee was found to be state action where a state statute delegated power to determine party membership. Thus, there was overt official involvement, as well as aspects of a public function. In contrast, in 1935, in _Grovey v. Townsend_, the Court held that a political party could exclude blacks from membership since that action, taken without the benefit of a statute, was done literally by a private group.

Based upon its more functional approach to law, a Holmesian-era Court in 1944 overruled _Grovey v. Townsend_ in _Smith v. Allwright_, because when the state allowed a private political party to deny in their primary election the eligibility of blacks to vote that was the functional equivalent of excluding blacks from the primary based upon the state statutory permission that occurred in _Nixon v. Condon_. The 1953 case of _Terry v. Adams_ was the last in this line of cases, with the Court holding, as excerpted above, that excluding blacks from a private group’s voting in a pre-Democratic party primary was state action because the winners of that primary, “with few exceptions since 1889 have run and won unopposed” in formal Democratic primaries. Functionally, therefore, it was indistinguishable from _Herndon_ and _Condon_.

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17 273 U.S. 536, 540-41 (1927) (Holmes, J., for a unanimous Court).

18 286 U.S. 73, 88-89 (1932); _id._ at 89 (McReynolds, J., joined by Van Devanter, Sutherland & Butler, JJ., dissenting).


Evans v. Newton
382 U.S. 296 (1966)

Justice DOUGLAS delivered the opinion of the Court.

In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as “a park and pleasure ground” for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that “in their social relations the two races (white and negro) should be forever separate.” The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

Thereupon, individual members of the Board of Managers of the park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred.

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause.

Yet generalizations do not decide concrete cases. “Only by sifting facts and weighing circumstances” (Burton v. Wilmington Parking Authority, supra, 365 U.S. at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case. The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems. Pierce v. Society of Sisters, 268 U.S. 510.

If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered.

This park, however, is in a different posture. For years it was an integral part of the City of Macon's activities. From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann. § 92-201. The momentum it acquired as a public facility is certainly not dissipated.
ipso facto by the appointment of “private” trustees. So far as this record shows, there has been no
change in municipal maintenance and concern over this facility. Whether these public characteristics
will in time be dissipated is wholly conjectural. If the municipality remains entwined in the
management or control of the park, it remains subject to the restraints of the Fourteenth Amendment
just as the private utility in Public Utilities Commission of District of Columbia v. Pollak, 343 U.S.
451, 462 [(1952)], remained subject to the Fifth Amendment because of the surveillance which
federal agencies had over its affairs. We only hold that where the tradition of municipal control had
become firmly established, we cannot take judicial notice that the mere substitution of trustees
instantly transferred this park from the public to the private sector.

This conclusion is buttressed by the nature of the service rendered the community by a park. The
service rendered even by a private park of this character is municipal in nature. It is open to every
white person, there being no selective element other than race. Golf clubs, social centers, luncheon
clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private
sector are often racially oriented. A park, on the other hand, is more like a fire department or police
department that traditionally serves the community. Mass recreation through the use of parks is
plainly in the public domain, Watson v. Memphis, 373 U.S. 526; and state courts that aid private
parties to perform that public function on a segregated basis implicate the State in conduct
proscribed by the Fourteenth Amendment. Like the streets of the company town in Marsh v. State
of Alabama, supra, the elective process of Terry v. Adams, supra, and the transit system of Public
Utilities Commission of District of Columbia v. Pollak, supra, the predominant character and
purpose of this park are municipal.

Under the circumstances of this case, we cannot but conclude that the public character of this park
requires that it be treated as a public institution subject to the command of the Fourteenth
Amendment, regardless of who now has title under state law. We may fairly assume that had the
Georgia courts been of the view that even in private hands the park may not be operated for the
public on a segregated basis, the resignation would not have been approved and private trustees
appointed. We put the matter that way because on this record we cannot say that the transfer of title
per se disentangled the park from segregation under the municipal regime that long controlled it.

Hudgens v. NLRB
424 U.S. 507 (1976)

Justice STEWART delivered the opinion of the Court.

A group of labor union members who engaged in peaceful primary picketing within the confines of
a privately owned shopping center were threatened by an agent of the owner with arrest for criminal
trespass if they did not depart. The question presented is whether this threat violated the National
Labor Relations Board concluded that it did, 205 N.L.R.B. 628, and the Court of Appeals for the
Fifth Circuit agreed. 501 F.2d 161. We granted certiorari because of the seemingly important
questions of federal law presented. 420 U.S. 971.
It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. See Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U.S. 94. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

This elementary proposition is little more than a truism. But even truisms are not always unexceptionably true, and an exception to this one was recognized almost 30 years ago in Marsh v. Alabama, 326 U.S. 501 [(1946)]. In Marsh, a Jehovah's Witness who had distributed literature without a license on a sidewalk in Chickasaw, Ala., was convicted of criminal trespass. Chickasaw was a so-called company town, wholly owned by the Gulf Shipbuilding Corp. It was described in the Court's opinion as follows: “Except for (ownership by a private corporation) it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated.”

It was the Marsh case that in 1968 provided the foundation for the Court's decision in Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 [(1968)]. That case involved peaceful picketing within a large shopping center near Altoona, Pa. One of the tenants of the shopping center was a retail store that employed a wholly nonunion staff. Members of a local union picketed the store, carrying signs proclaiming that it was nonunion and that its employees were not receiving union wages or other union benefits. The picketing took place on the shopping center's property in the immediate vicinity of the store.

The Court's opinion then reviewed the Marsh case in detail, emphasized the similarities between the business block in Chickasaw, Ala., and the Logan Valley shopping center and unambiguously concluded: “The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in Marsh.” 391 U.S., at 318.

There were three dissenting opinions in the Logan Valley case, one of them by the author of the Court's opinion in Marsh, Justice Black. His disagreement with the Court's reasoning was total:

“In affirming petitioners' contentions the majority opinion relies on Marsh v. State of Alabama, supra, and holds that respondents' property has been transformed to some type of public property. But Marsh was never intended to apply to this kind of situation. Marsh dealt with the very special situation of a company-owned town, complete with streets alleys, sewers, stores, residences, and everything else that goes to make a town. . . . I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a ‘town.’” 391 U.S., at 330-331 (footnote omitted).
“The question is, Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town, i.e., ‘residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.’ 326 U.S., at 502. I can find nothing in Marsh which indicates that if one of these features is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.” Id., at 332.

Four years later the Court had occasion to reconsider the Logan Valley doctrine in Lloyd Corp. v. Tanner, 407 U.S. 551 [(1972)]. That case involved a shopping center covering some 50 acres in downtown Portland, Ore. On a November day in 1968 five young people entered the mall of the shopping center and distributed handbills protesting the then ongoing American military operations in Vietnam. Security guards told them to leave, and they did so, “to avoid arrest.” Id., at 556. They subsequently brought suit in a Federal District Court, seeking declaratory and injunctive relief. The trial court ruled in their favor, holding that the distribution of handbills on the shopping center's property was protected by the First and Fourteenth Amendments. The Court of Appeals for the Ninth Circuit affirmed the judgment, 446 F.2d 545, expressly relying on this Court's Marsh and Logan Valley decisions. This Court reversed the judgment of the Court of Appeals.

The Court in its Lloyd opinion did not say that it was overruling the Logan Valley decision. Indeed a substantial portion of the Court's opinion in Lloyd was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the hand-billing in Lloyd, the picketing in Logan Valley had been specifically directed to a store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. 407 U.S., at 561-567. But the fact is that the reasoning of the Court's opinion in Lloyd cannot be squared with the reasoning of the Court's opinion in Logan Valley.

It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case. Not only did the Lloyd opinion incorporate lengthy excerpts from two of the dissenting opinions in Logan Valley, 407 U.S., at 562-563, 565; the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley: “The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on State action, not on action by the owner of private property used nondiscriminatorily for private purposes only. . . .” 407 U.S., at 567.

It conversely follows, therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.
Justice STEVENS took no part in the consideration or decision of this case.

Justice WHITE, concurring in the result.

While I concur in the result reached by the Court, I find it unnecessary to inter Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), and therefore do not join the Court's opinion. I agree that “the constitutional guarantee of free expression has no part to play in a case such as this,” Ante, at 1037; but Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), did not overrule Logan Valley, either expressly or implicitly, and I would not, somewhat after the fact, say that it did.

One need go no further than Logan Valley itself, for the First Amendment protection established by Logan Valley was expressly limited to the picketing of a specific store for the purpose of conveying information with respect to the operation in the shopping center of that store: “The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.” 391 U.S., at 320 n.9.

On its face, Logan Valley does not cover the facts of this case. The pickets of the Butler Shoe Co. store in the North DeKalb Shopping Center were not purporting to convey information about the “manner in which that particular (store) was being operated” but rather about the operation of a warehouse not located on the center's premises. The picketing was thus not “directly related in its purpose to the use to which the shopping center property was being put.”

The First Amendment question in this case was left open in Logan Valley. I dissented in Logan Valley, 391 U.S., at 337,, and I see no reason to extend it further. Without such extension, the First Amendment provides no protection for the picketing here in issue and the Court need say no more. Lloyd v. Tanner is wholly consistent with this view. There is no need belatedly to overrule Logan Valley, only to follow it as it is.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The Court today holds that the First Amendment poses no bar to a shopping center owner's prohibiting speech within his shopping center. After deciding this far-reaching constitutional question, and overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), in the process, the Court proceeds to remand for consideration of the statutory question whether the shopping center owner in this case unlawfully interfered with the Butler Shoe Co. employees' rights under § 7 of the National Labor Relations Act, 29 U.S.C. § 157.

The foundation of Logan Valley consisted of this Court's decisions recognizing a right of access to streets, sidewalks, parks, and other public places historically associated with the exercise of First Amendment rights. E.g., Hague v. CIO, 307 U.S. 496, 515-516 (1939) (opinion of Roberts, J.);
Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Jamison v. Texas, 318 U.S. 413 (1943); Saia v. New York, 334 U.S. 558 (1948). Thus, the Court in *Logan Valley* observed that access to such forums “cannot constitutionally be denied broadly and absolutely.” 391 U.S., at 315. The importance of access to such places for speech-related purposes is clear, for they are often the only places for effective speech and assembly.

*Marsh v. State of Alabama*, supra, which the Court purports to leave untouched, made clear that in applying those cases granting a right of access to streets, sidewalks, and other public places, courts ought not let the formalities of title put an end to analysis. The Court in *Marsh* observed that “the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.” 326 U.S., at 503. That distinction was not determinative: “Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” Id., at 506.

The Court adopts the view that *Marsh* has no bearing on this case because the privately owned property in *Marsh* involved all the characteristics of a typical town. But there is nothing in *Marsh* to suggest that its general approach was limited to the particular facts of that case. The underlying concern in *Marsh* was that traditional public channels of communication remain free, regardless of the incidence of ownership. Given that concern, the crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication; it was immaterial that the company also owned a sewer system and that its property in other respects resembled a town.

In *Logan Valley* we recognized what the Court today refuses to recognize that the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the “State” from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town. I simply cannot reconcile the Court's denial of any role for the First Amendment in the shopping center with *Marsh*'s recognition of a full rule for the First Amendment on the streets and sidewalks of the company-owned town.

The interest of members of the public in communicating with one another on subjects relating to the businesses that occupy a modern shopping center is substantial. Not only employees with a labor dispute, but also consumers with complaints against business establishments, may look to the location of a retail store as the only reasonable avenue for effective communication with the public. As far as these groups are concerned, the shopping center owner has assumed the traditional role of the state in its control of historical First Amendment forums. *Lloyd* and *Logan Valley* recognized the vital role the First Amendment has to play in such cases, and I believe that this Court errs when it holds otherwise.
As noted in *Hudgens v. NLRB*, the Court held in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, that a large privately-owned shopping center was the equivalent of the company town in *Marsh*. This decision was made in 1968 at the height of the 1960s Warren Court, which included five liberal instrumentalist Justices on the Court as the same time: Chief Justice Warren, and Justices Douglas, Brennan, Marshall, and Fortas. As noted at § 3.3.4 text following n.44, once Chief Justice Warren retired and was replaced by Chief Justice Burger in 1969, at most only four instrumentalists remained on the Court from 1969-86. State action cases from this period indicate a more balanced approach towards each of the three factors: public function, overt official involvement, and entwinement, as in *Hudgens v. NLRB*. However, some state Supreme Courts, under state constitutions, have continued to find state action in these, and similar, circumstances.\(^{21}\)

With respect to the “public function” analysis, the Court held in 1987 in *San Francisco v. United States Olympic Committee*,\(^{22}\) that where the United States Olympic Committee had been granted by Congress exclusive commercial use of the word "Olympic," the Committee was not a government actor because “neither the conduct nor the coordination of amateur sports has been a traditional government function” so as to make the activity a “public function.” The mere granting of a trademark to the Olympic Committee by Congress, and then acquiescing in how the Committee enforced those trademark rights, did not create sufficient connections under the “entwinement” part of the state action analysis. Justices Brennan, Marshall, Blackmun, and O’Connor dissented.

\section*{§ 15.3 Cases Predominantly Involving Overt Official Involvement}

*Shelley v. Kraemer*

334 U.S. 1 (1948)

Chief Justice VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

\[^{21}\text{See, e.g., Batchelder v. Allied Stores International, Inc., 445 N.E.2d 590 (Mass. 1983) (shopping center must allow candidate to solicit signatures for ballot access); Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 153 Cal. Rptr. 854 (1979) (shopping center a state actor under the California Constitution). Most states have followed the Hudgens result. See generally Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060, 1070-74 (N.J. 2007) (collecting cases from various states, while noting that New Jersey does not require “state action” and has a more flexible test for when distributing leaflets in shopping centers must be allowed under the New Jersey Constitution).}]

\[^{22}\text{483 U.S. 522, 544-48 (1987); id. at 548 (O’Connor, J., joined by Blackmun, J., concurring in part and dissenting in part); id. at 548-49 (Brennan, J., joined by Marshall, J., dissenting).}]

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It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the affected property shall be “occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.” Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that “This property shall not be used or occupied by any person or persons except those of the Caucasian race.”

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color: “simply that and nothing more.” [FN 6: Buchanan v. Warley, 245 U.S. 60, 73 [(1917)].

It is . . . clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of Buchanan v. Warley, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons.

Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 [(1883)], the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. Corrigan v. Buckley, [271 U.S. 323 (1917)].

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment.
That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Commonwealth of Virginia v. Rives, 100 U.S. 313, 318 [(1880)], this Court stated: “It is doubtless true that a State may act through different agencies, – either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.”

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In Twining v. New Jersey, 211 U.S. 78, 90, 91, [(1908)], the Court said: “The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state.” In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 [(1930)], the Court, through Mr. Justice Brandeis, stated: “The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.”

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts [Ed.: at the behest of a number of neighbors who had also signed the restrictive covenant and wanted it enforced], supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Justice REED, Justice JACKSON, and Justice RUTLEDGE took no part in the consideration or decision of these cases.
Under *Shelley*, if judicial enforcement of private action always constitutes state action, then logically
enforcement of a will in court would trigger an Equal Protection Clause analysis, or a private citizen
asking a judge for enforcement of trespass laws to remove a loud-mouthed guest would trigger a
First Amendment free speech analysis. The Supreme Court has never said that it does, nor do other
courts reach that conclusion. A court more focused on logic and analytic development of the law
might have attempted to state in *Shelley* some clear limiting principles to the doctrine. The
functional perspective of the Holmesian and instrumentalist courts, however, placed little emphasis
on that issue, preferring instead to adopt pragmatic results on a case-by-case basis that prevented
courts from being used for racially discriminatory reasons, but permitted sensible enforcement of
probate and trespass laws to go forward uninhibited.\(^{23}\) The major case following *Shelley* in finding
state action is *New York Times v. Sullivan*,\(^ {24}\) excerpted at § 8.1 of CHARLES D. KELSO & R. RANDALL
KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3: THE FIRST AMENDMENT
(2018) (available at: [http://libguides.stcl.edu/kelsomaterials](http://libguides.stcl.edu/kelsomaterials)), where the Court held that state law
defamation actions are limited to some extent by First Amendment free speech principles.

Despite *Shelley*, lower state and federal courts typically, though not always, find no state action in
judicial enforcement of non-racially based land-use restrictions, such as those requiring single
family residences, or age restrictions, or excluding houses of worship, or banning the posting of “for
sale” signs; or in judicial enforcement of confidentiality provisions in settlement agreements that
limit individual free speech rights.\(^ {25}\) Today, a finding of state action would not be needed in many
housing cases, as the Fair Housing Act of 1968 bans private discrimination in housing based on race,
color, sex, national origin, or religion. The Fair Housing Amendments Act of 1988 added provisions
banning discrimination against disabled persons and families with children under 18 years of age
or where the woman is pregnant.

\(^{23}\) See generally Harvey Rishikof & Alexander Wohl, Private Communities or Public
cited therein; Henry C. Strickland, The State Action Doctrine and the Rehnquist Court, 18 Hastings
Const. L.Q. 587, 602-06(1991); David Haber, Notes on the Limits of Shelley v. Kraemer, 18 Rutgers
L. Rev. 811 (1964); Herbert Wechsler, Towards Neutral Principles in Constitutional Law, 73 Harv.
L. Rev. 1, 29-31 (1959) (the doctrine of *Shelley* does not embody stated neutral principles of law).

\(^{24}\) 376 U.S. 254, 265 (1964).

Brands, Inc., 44 F.3d 940 (11th Cir. 1995) (settlement agreement restricting free speech rights);
Langley v. Monumental Corp., 496 F. Supp. 1144 (D. Md. 1980) (age restriction); Linn Valley
Lakes Property Owners Ass’n v. Brockway, 824 P.2d 948 (Kan. 1992) (posting signs); Ireland v.
Bible Baptist Church, 480 S.W.2d 467 (Tex. Ct. App. 1972) (single-family restriction, excluding
house of worship) (no state action found) *with* Franklin v. White Egret Condominium, Inc., 358 So.
2d 1084 (Fla. Dist. Ct. App. 1977) (age restriction); West Hill Baptist Church v. Abbate, 261 N.E.2d
196 (Ohio Common Pleas 1969) (excluding houses of worship) (state action found).
Justice WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part: “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.”

Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as “state action.”

Title 42 U.S.C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . . .” This case concerns the relationship between the § 1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action.

In 1977, petitioner, a lessee-operator of a truckstop in Virginia, was indebted to his supplier, Edmondson Oil Co., Inc. Edmondson sued on the debt in Virginia state court. Ancillary to that action and pursuant to state law, Edmondson sought prejudgment attachment of certain of petitioner's property. Va.Code § 8.01-533 (1977). The prejudgment attachment procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition. [FN 3: The principal action then proceeded to the entry of judgment on the debt in favor of Edmondson and some of petitioner's property was sold in execution of the judgment].

Careful adherence to the “state action” requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of “fair attribution.” First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State
is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Turning to this case, the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as “state actors.”

While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.

We have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a “state actor” for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in Adickes v. S. H. Kress & Co., 398 U.S., at 152 [(1970)], in the context of an equal protection deprivation: “Private persons, jointly engaged with state officials in the prohibited action, are acting “under color” of law for purposes of the statute. To act “under color” of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,”” quoting United States v. Price, 383 U.S., at 794 [(1966)].

The Court of Appeals erred in holding that in this context “joint participation” required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute.

In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute.

Chief Justice BURGER, dissenting.

Respondents did no more than invoke a presumptively valid state prejudgment attachment procedure available to all. Relying on a dubious “but for” analysis, the Court erroneously concludes that the subsequent procedural steps taken by the State in attaching a putative debtor's property in some way transforms respondents' acts into actions of the State. This case is no different from the situation in
which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State. Dennis v. Sparks, 449 U.S. 24 (1980). Similarly, one who practices a trade or profession, drives an automobile, or builds a house under a state license is not engaging in acts fairly attributable to the state. In both Dennis and the instant case petitioner's remedy lies in private suits for damages such as malicious prosecution. The Court's opinion expands the reach of the statute beyond anything intended by Congress. It may well be a consequence of too casually falling into a semantical trap because of the figurative use of the term “color of state law.”

Justice POWELL, with whom Justice REHNQUIST and Justice O'CONNOR join, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent – a small wholesale oil dealer in Southside, Va.– brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt. The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors. No court had questioned the validity of the statute, and it remains presumptively valid. The Clerk of the state court duly issued a writ of attachment, and the County Sheriff then executed it. There is no allegation that respondent conspired with the state officials to deny petitioner the fair protection of state or federal law.

Respondent ultimately prevailed in his lawsuit. The petitioner Lugar was ordered by a court to pay his debt. A state court did find, however, that Lugar's assets should not have been attached prior to a judgment on the underlying action.

It of course is true that respondent's private action was followed by state action, and that the private and the state actions were not unconnected. But “[t]hat the State responds to [private] actions by [taking action of its own] does not render it responsible for those [private] actions.” Blum v. Yaretsky, 457 U.S. 991, 1005 [(1982)]. See Flagg Bros., 436 U.S., at 164-165 [(1978)]; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered “state action” within the meaning of our cases. See, e.g., Blum v. Yaretsky, 457 U.S., at 1004-1005; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-173 (1972). As in Jackson v. Metropolitan Edison Co., supra, “[r]espondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so ‘state action’ for purposes of the Fourteenth Amendment.” 419 U.S., at 357 (footnote omitted).
With respect to “overt official involvement” in debt collection cases, four years before *Lugar* no state action was found in *Flagg Bros., Inc. v. Brooks*. Twenty-six *Flagg Bros.* involved an unpaid warehouseman who made private sales of stored property to satisfy a debt. Despite the fact that the action was authorized by a Uniform Commercial Code provision approving a private self-help remedy for creditors, UCC § 7-210, the Court majority concluded that this situation involved a “private self-help” remedy, not state action. Liberal instrumentalist Justices Marshall and Stevens, and liberal Holmesian Justice White, dissented in *Flagg Bros.*, concluding that the UCC provision constituted state action. Justice Brennan took no part in the consideration or decision of the case.

In contrast, in *Lugar v. Edmondson Oil Co., Inc.*, excerpted above, the Court did find state action based on “overt official involvement.” In *Lugar*, the creditor needed to ask a court for help in getting a pre-judgment writ of attachment, and asked for executive assistance in having the sheriff come out to help attach the debtor’s property. The key vote in *Lugar* was provided by Justice Blackmun, who switched from his position in *Flagg Bros* that no state action existed. He found *Lugar* a different case because the private party had received help from a judge who authorized a writ of attachment, which was executed by a sheriff. The other Justices on the Court decided *Flagg Bros.* and *Lugar* the same way, with the more liberal Justices (White, Marshall, and Stevens in *Flagg Bros.* and Brennan, White, Marshall, and Stevens in *Lugar*) finding state action in each case, and the more conservative Justices (Chief Justice Burger and Justices Rehnquist and Powell in both cases, and Justice Stewart in *Flagg Bros.* replaced by Justice O’Connor in *Lugar*) finding no state action. Recall, when discussing Justice Blackmun’s shift from *National League of Cities* to *Garcia* under 10th Amendment doctrine, discussed at § 8.1.1(D) nn.20-25, Justice Blackmun is perhaps best viewed as an example of a contemporary judge who began his service on the Court during the 1970s deciding cases more as a moderate natural law judge, but whose decisions in the 1980s and 1990s reflected more of a liberal instrumentalist approach. While there are slight factual differences between *Flagg Bros.* and *Lugar* that could justify a shift in position, Justice Blackmun’s general drift towards a liberal instrumentalist approach probably also helps explains his votes in these cases.

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**Edmonson v. Leesville Concrete Co.**  
500 U.S. 614 (1991)

Justice KENNEDY delivered the opinion of the Court.

We must decide in the case before us whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors.

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26 436 U.S. 149, 157-65 (1978); *id.* at 168-73 (Stevens, J., joined by White & Marshall, JJ., dissenting); *id.* at 166 (Brennan, J., took no part in the consideration or decision of the case).
We begin our discussion within the framework for state-action analysis set forth in *Lugar*, supra, 457 U.S., at 937. There we considered the state-action question in the context of a due process challenge to a State's procedure allowing private parties to obtain prejudgment attachments. We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, *Lugar*, supra, at 939-941; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor, id., at 941-942.

There can be no question that the first part of the *Lugar* inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact. While we have recognized the value of peremptory challenges in this regard, particularly in the criminal context, see *Batson*, 476 U.S., at 98-99, there is no constitutional obligation to allow them. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Stilson v. United States*, 250 U.S. 583, 586 (1919). Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.

Given that the statutory authorization for the challenges exercised in this case is clear, the remainder of our state-action analysis centers around the second part of the *Lugar* test, whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges. Although we have recognized that this aspect of the analysis is often a factbound inquiry, see *Lugar*, supra, 457 U.S., at 939, our cases disclose certain principles of general application. Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); whether the actor is performing a traditional governmental function, see *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* 483 U.S. 522, 544-545 (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see *Shelley v. Kraemer*, 334 U.S. 1 (1948). Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action.

Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, *Tulsa Professional*, 485 U.S., at 485, our cases have found state action when private parties make extensive use of state procedures with “the overt, significant assistance of state officials.” Id., at 486; see *Lugar v. Edmondson Oil Co.* 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969). It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers. In the federal system, Congress has established the qualifications for jury service, see 28 U.S.C. § 1865, and has outlined the procedures by which jurors are selected. To this end, each district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors. 28
U.S.C. § 1863; see, e.g., Jury Plan for the United States District Court for the Western District of Louisiana (on file with Administrative Office of United States Courts). This plan, as with all other trial court procedures, must implement statutory policies of random juror selection from a fair cross section of the community, 28 U.S.C. § 1861, and non-exclusion on account of race, color, religion, sex, national origin, or economic status, 18 U.S.C. § 243; 28 U.S.C. § 1862. Statutes prescribe many of the details of the jury plan, 28 U.S.C. § 1863, defining the jury wheel, § 1863(b)(4), voter lists, §§ 1863(b)(2), 1869(c), and jury commissions, § 1863(b)(1). A statute also authorizes the establishment of procedures for assignment to grand and petit juries, § 1863(b)(8), and for lawful excuse from jury service, §§ 1863(b)(5), (6).

Prospective jurors must complete jury qualification forms as prescribed by the Administrative Office of the United States Courts. See 28 U.S.C. § 1864. Failure to do so may result in fines and imprisonment, as might a willful misrepresentation of a material fact in answering a question on the form. Ibid. In a typical case, counsel receive these forms and rely on them when exercising their peremptory strikes. See G. Bermant, Jury Selection Procedures in United States District Courts 7-8 (Federal Judicial Center 1982). The clerk of the United States district court, a federal official, summons potential jurors from their employment or other pursuits. They are required to travel to a United States courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers. Whether or not they are selected for a jury panel, summoned jurors receive a per diem fixed by statute for their service. 28 U.S.C. § 1871.

The trial judge exercises substantial control over voir dire in the federal system. See Fed. Rule Civ. Proc. 47. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire voir dire by themselves, a common practice in the District Court where the instant case was tried. See Louisiana Rules of Court, Local Rule 13.02 (WD La.1990). The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. 28 U.S.C. § 1870. When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused.

As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the “final and practical denial” of the excluded individual's opportunity to serve on the petit jury. Virginia v. Rives, 100 U.S. 313, 322 (1880). Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court “has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.” Burton v. Wilmington Parking Authority, 365 U.S., at 725. In so doing, the government has “create[d] the legal framework governing the [challenged] conduct,” National Collegiate Athletic Assn., 488 U.S., at 192, and in a significant way has involved itself with invidious discrimination.
In determining Leesville's state-actor status, we next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. As we noted in Powers, the jury system performs the critical governmental functions of guarding the rights of litigants and “ensur[ing] continued acceptance of the laws by all of the people.” 499 U.S., at 407.

Our decision in West v. Atkins, 487 U.S. 42 (1988), provides a further illustration. We held there that a private physician who contracted with a state prison to attend to the inmates' medical needs was a state actor. He was not on a regular state payroll, but we held his “function[s] within the state system, not the precise terms of his employment, [determined] whether his actions can fairly be attributed to the State.” Id., at 55-56. We noted: “Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.” Id., at 55.

[These] parties do not act pursuant to any contractual relation with the government. Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. Rose v. Mitchell, 443 U.S. 545, 556 (1979); Smith v. Texas, 311 U.S. 128, 130 (1940). In the many times we have addressed the problem of racial bias in our system of justice, we have not “questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.” Powers, 499 U.S., at 402. To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.
Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

The Court concludes that the action of a private attorney exercising a peremptory challenge is attributable to the government and therefore may compose a constitutional violation. This conclusion is based on little more than that the challenge occurs in the course of a trial. Not everything that happens in a courtroom is state action. A trial, particularly a civil trial is by design largely a stage on which private parties may act; it is a forum through which they can resolve their disputes in a peaceful and ordered manner. The government erects the platform; it does not thereby become responsible for all that occurs upon it. As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly. Because I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action, I dissent.

In order to establish a constitutional violation, Edmonson must first demonstrate that Leesville's use of a peremptory challenge can fairly be attributed to the government.


The Court concludes that this standard is met in the present case. It rests this conclusion primarily on two empirical assertions. First, that private parties use peremptory challenges with the “overt, significant participation of the government.” Ante, at 2084. Second, that the use of a peremptory challenge by a private party “involves the performance of a traditional function of the government.” Ante, at 2085. Neither of these assertions is correct.

The Court amasses much ostensible evidence of the Federal Government's “overt, significant assistance” in the peremptory process. Most of this evidence is irrelevant to the issue at hand. The bulk of the practices the Court describes – the establishment of qualifications for jury service, the location and summoning of prospective jurors, the jury wheel, the voter lists, the jury qualification forms, the per diem for jury service – are independent of the statutory entitlement to peremptory strikes, or of their use. All of this Government action is in furtherance of the Government's distinct obligation to provide a qualified jury; the Government would do these things even if there were no peremptory challenges. All of this activity, as well as the trial judge's control over voir dire, is merely prerequisite to the use of a peremptory challenge; it does not constitute participation in the challenge. That these actions may be necessary to a peremptory challenge – in the sense that there could be no such challenge without a venire from which to select – no more makes the challenge state action than the building of roads and provision of public transportation makes state action of riding on a bus.

The entirety of the government's actual participation in the peremptory process boils down to a single fact: “When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused.” Ante, at 2084-2085. This is not significant participation. The judge's action in “advising” a juror that he or she has been excused is state action to be sure. It is, however, if not de
minimis, far from what our cases have required in order to hold the government “responsible” for private action or to find that private actors “represent” the government. See Blum, supra, 457 U.S., at 1004; Tarkanian, supra, 488 U.S., at 191. The government “normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” Blum, supra, 457 U.S., at 1004.

As an initial matter, the judge does not “encourage” the use of a peremptory challenge at all. The decision to strike a juror is entirely up to the litigant, and the reasons for doing so are of no consequence to the judge. It is the attorney who strikes. The judge does little more than acquiesce in this decision by excusing the juror. In point of fact, the government has virtually no role in the use of peremptory challenges. Indeed, there are jurisdictions in which, with the consent of the parties, voir dire and jury selection may take place in the absence of any court personnel. See Haith v. United States, 231 F.Supp. 495 (ED Pa.1964), aff'd, 342 F.2d 158 (CA3 1965) (per curiam); State v. Eberhardt, 282 N.E.2d 62 (1972).

The alleged state action here is a far cry from that which the Court found, for example, in Shelley v. Kraemer, 334 U.S. 1 (1948). In that case, state courts were called upon to enforce racially restrictive covenants against sellers of real property who did not wish to discriminate. The coercive power of the State was necessary in order to enforce the private choice of those who had created the covenants: “[B]ut for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.” Id., at 19. Moreover, the courts in Shelley were asked to enforce a facially discriminatory contract. In contrast, peremptory challenges are “exercised without a reason stated [and] without inquiry.” Swain, supra, 380 U.S., at 220. A judge does not “significantly encourage” discrimination by the mere act of excusing a juror in response to an unexplained request.

There is another important distinction between Shelley and this case. The state courts in Shelley used coercive force to impose conformance on parties who did not wish to discriminate. “Enforcement” of peremptory challenges, on the other hand, does not compel anyone to discriminate; the discrimination is wholly a matter of private choice. See Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv.L.Rev. 808, 819 (1989). Judicial acquiescence does not convert private choice into that of the State. See Blum, 457 U.S., at 1004-1005.

Nor is this the kind of significant involvement found in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). There, we concluded that the actions of the executrix of an estate in providing notice to creditors that they might file claims could fairly be attributed to the State. . . . In particular, a state statute directed the executrix to publish notice. [Id. at 487.] There is no comparable state involvement here. No one is compelled by government action to use a peremptory challenge, let alone to use it in a racially discriminatory way.

The Court relies also on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). But the decision in that case depended on the perceived symbiotic relationship between a restaurant and the
state parking authority from whom it leased space in a public building. The State had “so far insinuated itself into a position of interdependence with” the restaurant that it had to be “recognized as a joint participant in the challenged activity.” Burton, supra, at 725. Among the “peculiar facts [and] circumstances” leading to that conclusion was that the State stood to profit from the restaurant's discrimination. 365 U.S., at 726, 724. As I have shown, the government's involvement in the use of peremptory challenges falls far short of “interdependence” or “joint participation.” Whatever the continuing vitality of Burton beyond its facts, see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974), it does not support the Court's conclusion here.

Jackson is a more appropriate analogy to this case. Metropolitan Edison terminated Jackson's electrical service under authority granted it by the State, pursuant to a procedure approved by the state utility commission. Nonetheless, we held that Jackson could not challenge the termination procedure on due process grounds. The termination was not state action because the State had done nothing to encourage the particular termination practice: “Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment.” Id., at 357 (emphasis added; footnote omitted).

The similarity to this case is obvious. The Court's “overt, significant” government participation amounts to the fact that the government provides the mechanism whereby a litigant can choose to exercise a peremptory challenge. That the government allows this choice and that the judge approves it, does not turn this private decision into state action.

To the same effect is Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). In that case, a warehouse company's proposed sale of goods entrusted to it for storage pursuant to the New York Uniform Commercial Code was not fairly attributable to the State. We held that “the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel, to threaten to sell these respondents' belongings.” Id., at 165. Similarly, in the absence of compulsion, or at least encouragement, from the government in the use of peremptory challenges, the government is not responsible.

The Court errs also when it concludes that the exercise of a peremptory challenge is a traditional government function. In its definition of the peremptory challenge, the Court asserts, correctly, that jurors struck via peremptories “otherwise . . . satisfy the requirements for service on the petit jury.” Ante, at 2083. Whatever reason a private litigant may have for using a peremptory challenge, it is not the government's reason. The government otherwise establishes its requirements for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason. This is not part of the government's function in establishing the requirements for jury service. “Peremptory challenges are exercised by a party, not in selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger.” C. Lincoln, Abbott's Civil Jury Trials 92 (3d ed. 1912), quoting O'Neil v. Lake Superior Iron Co., 67
Mich. 560, 561, 35 N.W. 162, 163 (1887). For this reason, the Court is incorrect, and inconsistent
with its own definition of the peremptory challenge, when it says that “[i]n the jury selection process
[in a civil trial], the government and private litigants work for the same end.” See ante, at 2086. The
Court is also incorrect when it says that a litigant exercising a peremptory challenge is performing
“a traditional function of the government.” See ante, at 2085.

The peremptory challenge is a practice of ancient origin, part of our common law heritage in
criminal trials. See Swain, supra, at 212-218 (tracing history); Holland, 493 U.S., at 481 (same).
Congress imported this tradition into federal civil trials in 1872. See ch. 333, 17 Stat. 282; Swain,
380 U.S., at 215, n.14. The practice of unrestrained private choice in the selection of civil juries is
even older than that, however. While there were no peremptory challenges in civil trials at common
law, the struck jury system allowed each side in both criminal and civil trials to strike alternately,
and without explanation, a fixed number of jurors. See id., at 217-218, and n.21, citing J. Proffatt,
Trial by Jury § 72 (1877), and F. Busch, Law and Tactics in Jury Trials § 62 (1949). Peremptory
challenges are not a traditional government function; the “tradition” is one of unguided private
choice. The Court may be correct that “[w]here it not for peremptory challenges, . . . the entire
process of determining who will serve on the jury [would] constitut[e] state action.” Ante, at 2086.
But there are peremptory challenges, and always have been. The peremptory challenge forms no part
of the government's responsibility in selecting a jury.

A peremptory challenge by a private litigant does not meet the Court's standard; it is not a traditional
government function. Beyond this, the Court has misstated the law. The Court cites Terry v. Adams,
345 U.S. 461 (1953), and Marsh v. Alabama, 326 U.S. 501 (1946), for the proposition that state
action may be imputed to one who carries out a “traditional governmental function.” Ante, at 2083.
In those cases, the Court held that private control over certain core government activities rendered
the private action attributable to the State. In Terry, the activity was a private primary election that
effectively determined the outcome of county general elections. In Marsh, a company that owned
a town had attempted to prohibit on its sidewalks certain protected speech.

In Flagg Bros., supra, the Court reviewed these and other cases that found state action in the
exercise of certain public functions by private parties. See 436 U.S., at 157-160, reviewing Terry,
explained that the government functions in these cases had one thing in common: exclusivity. The
public-function doctrine requires that the private actor exercise “a power ‘traditionally exclusively
reserved to the State.’” 436 U.S., at 157, quoting Jackson, 419 U.S., at 352. In order to constitute
state action under this doctrine, private conduct must not only comprise something that the
government traditionally does, but something that only the government traditionally does. Even if
one could fairly characterize the use of a peremptory strike as the performance of the traditional
government function of jury selection, it has never been exclusively the function of the government
to select juries; peremptory strikes are older than the Republic.

None of this should be news, as this case is fairly well controlled by Polk County v. Dodson, 454
U.S. 312 (1981). We there held that a public defender, employed by the State, does not act under
color of state law when representing a defendant in a criminal trial. In such a circumstance,
government employment is not sufficient to create state action. More important for present purposes, neither is the performance of a lawyer's duties in a courtroom. This is because a lawyer, when representing a private client, cannot at the same time represent the government.

Trials in this country are adversarial proceedings. Attorneys for private litigants do not act on behalf of the government, or even the public as a whole; attorneys represent their clients. An attorney's job is to “advanc[e] the ‘undivided interests of his client.’ This is essentially a private function . . . for which state office and authority are not needed.” Id., at 318-319 (footnotes omitted). When performing adversarial functions during trial, an attorney for a private litigant acts independently of the government.

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§ 15.4 Cases Predominantly Involving Entanglement/Entwinement Analysis

Burton v. Wilmington Parking Authority
365 U.S. 715 (1961)

Justice CLARK delivered the opinion of the Court.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. Appellant claims that such refusal abridges his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Delaware has held that Eagle was acting in “a purely private capacity” (157 A.2d 902) under its lease; that its action was not that of the Authority and was not, therefore, state action within the contemplation of the prohibitions contained in that Amendment.

The land and building were publicly owned. As an entity, the building was dedicated to “public uses” in performance of the Authority's “essential governmental functions.” 22 Del. Code §§ 501, 514. The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, cf. Derrington v. Plummer, 240 F.2d 922, 925 [(5th Cir. 1957)], the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become part of the realty,
there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction. [FN 2: See Aaron v. Cooper, 8 Cir., 261 F.2d 97; City of Greensboro v. Simkins, 4 Cir., 246 F.2d 425; Derrington v. Plummer, 5 Cir., 240 F.2d 922; Coke v. City of Atlanta, D.C.N.D. Ga., 184 F.Supp. 579; Jones v. Marva Theatres, D.C.D.Md., 180 F. Supp. 49; Tate v. Department of Conservation, D.C.E.D.Va., 133 F. Supp. 53, affirmed 4 Cir., 231 F.2d 615; Nash v. Air Terminal Services, D.C.E.D.Va., 85 F.Supp. 545; Lawrence v. Hancock, D.C.S.D.W.Va., 76 F.Supp. 1004, and see Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, vacating and remanding 6 Cir., 202 F.2d 275.] By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.

In contrast to Burton, no state action was found in Moose Lodge No. 107 v. Irvis, which involved race discrimination by a private club that had a liquor license. Burton was distinguished as involving joint participation, particularly since in Burton the restaurant was leased from the government, not merely licensed by the government to serve alcohol. Justices Douglas, Brennan, and Marshall dissented in Moose Lodge. Today, the Burton case facts would be governed by the Civil Rights Act of 1964, which bans racial discrimination in restaurant accommodations, as noted

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27 407 U.S. 163, 172-78 (1972); id. at 181-83 (Douglas, J., joined by Marshall, J., dissenting); id. at 184-90 (Brennan, J., joined by Marshall, JJ., dissenting).
in Katzenbach v. McClung, excerpted at § 6.3. The private member club in Moose Lodge could still discriminate, as private clubs are excluded from that Act’s ban on private racial discrimination.

**Jackson v. Metropolitan Edison Co.**

419 U.S. 345 (1974)

Justice REHNQUIST delivered the opinion of the Court.

Respondent Metropolitan Edison Co. is a privately owned and operated Pennsylvania corporation which holds a certificate of public convenience issued by the Pennsylvania Public Utility Commission empowering it to deliver electricity to a service area which includes the city of York, Pa. As a condition of holding its certificate, it is subject to extensive regulation by the Commission. Under a provision of its general tariff filed with the Commission, it has the right to discontinue service to any customer on reasonable notice of nonpayment of bills.

Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. 407 U.S., at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be “state” acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Moose Lodge No. 107, supra, 407 U.S. at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. Burton v. Wilmington Parking Authority, supra.

Petitioner first argues that “state action” is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. But assuming that it had, this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment. In Pollak, supra, where the Court dealt with the activities of the District of Columbia Transit Co., a congressionally established monopoly, we expressly disclaimed reliance on the monopoly status of the transit authority. 343 U.S., at 462. Similarly, although certain monopoly aspects were presented in Moose Lodge No. 107, [407 U.S. 163 (1972)], we found that the Lodge's action was not subject to the provisions of the Fourteenth Amendment. In each of those cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here.
Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa. Stat. Ann., Tit. 66, s 1171 (1959), and hence performs a “public function.” We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, e.g., Nixon v. Condon, 286 U.S. 73 (1932) (election); Terry v. Adams, 345 U.S. 461 (1953) (election); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Evans v. Newton, 382 U.S. 296 (1966) (municipal park). If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty. Girard Life Insurance Co. v. City of Philadelphia, 88 Pa. 393 (1879); Baily v. Philadelphia, 39 A. 494 (1898).

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses “affected with the public interest” are state actors in all their actions.

We decline the invitation for reasons stated long ago in *Nebbia v. New York*, 291 U.S. 502 (1934), in the course of rejecting a substantive due process attack on state legislation: “It is clear that there is no closed class or category of businesses affected with a public interest . . . . The phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions ‘affected with a public interest,’ and ‘clothed with a public use,’ have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . .” Id., at 536.

Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, “affected with a public interest.” We do not believe that such a status converts their every action, absent more, into that of the State.

We also reject the notion that Metropolitan's termination is state action because the State “has specifically authorized and approved” the termination practice. In the instant case, Metropolitan filed with the Public Utility Commission a general tariff—a provision of which states Metropolitan's right to terminate service for nonpayment. This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission. Although the Commission did hold hearings on portions of Metropolitan's general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff. The provision became effective 60 days after filing when not disapproved by the Commission.
The case most heavily relied on by petitioner is *Public Utilities Comm'n v. Pollak*, supra. There the Court dealt with the contention that Capital Transit's installation of a piped music system on its buses violated the First Amendment rights of the bus riders. It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the “State” for First Amendment purposes, or whether it merely assumed, arguendo, that it was and went on to resolve the First Amendment question adversely to the bus riders. In either event, the nature of the state involvement there was quite different than it is here. The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not only that Capital Transit's practices were “not inconsistent with public convenience, comfort, and safety,” 81 P.U.R. (N.S.) 122, 126 (1950), but also that the practice “in fact, through the creation of better will among passengers, ... tends to improve the conditions under which the public ride.” Ibid. Here, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains. The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into “state action.” At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State does not make its action in doing so “state action.”

Justice DOUGLAS, dissenting.

I reach the opposite conclusion from that reached by the majority on the state-action issue.

The injury alleged took place when respondent discontinued its service to this householder without notice or opportunity to remedy or contest her alleged default, even though its tariff provided that respondent might “discontinue its service on reasonable notice.” May a State allow a utility – which in this case has no competitor – to exploit its monopoly in violation of its own tariff? May a utility have complete immunity under federal law when the State allows it regulatory agency to become the prisoner of the utility or, by a listless attitude of no concern, to permit the utility to use its monopoly power in a lawless way?

It is said that the mere fact of respondent's monopoly status, assuming arguendo that that status is state conferred or state protected, “is not determinative in considering whether Metropolitan's termination of service to petitioner was ‘state action’ for purposes of the Fourteenth Amendment.” Ante, at 454. Even so, a state-protected monopoly status is highly relevant in assessing the aggregate weight of a private entity's ties to the State.

It is said that the fact that respondent's services are “affected with a public interest” is not determinative. I agree that doctors, lawyers, and grocers are not transformed into state actors simply because they provide arguably essential goods and services and are regulated by the State. In the
present case, however, respondent is not just one person among many; it is the only public utility furnishing electric power to the city. When power is denied a householder, the home, under modern conditions, is likely to become unlivable.

Respondent's procedures for termination of service may never have been subjected to the same degree of state scrutiny and approval, whether explicit or implicit, that was present in Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952). Yet in the present case the State is heavily involved in respondent's termination procedures, getting into the approved tariff a requirement of “reasonable notice.” Pennsylvania has undertaken to regulate numerous aspects of respondent's operations in some detail, and a “hands-off” attitude of permissiveness or neutrality toward the operations in this case is at war with the state agency's functions of supervision over respondent's conduct in the area of servicing householders, particularly where (as here) the State would presumably lend its weight and authority to facilitate the enforcement of respondent's published procedures. Cf. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967); Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956); Shelley v. Kraemer, 334 U.S. 1 (1948).

In the aggregate, these factors depict a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control. The particular regulations at issue, promulgated by the monopolist, were authorized by state law and were made enforceable by the weight and authority of the State. Moreover, the State retains the power of oversight to review and amend the regulations if the public interest so requires. Respondent's actions are sufficiently intertwined with those of the State, and its termination-of-service provisions are sufficiently buttressed by state law to warrant a holding that respondent's actions in terminating this householder's service were “state action” for the purpose of giving federal jurisdiction over respondent under 42 U.S.C. § 1983.

Justice BRENNAN, dissenting.

I do not think that a controversy existed between petitioner and respondent entitling petitioner to be heard in this action. Under Pennsylvania law respondent's duty under Pa. Stat. Ann., Tit. 66, § 1171 (1959), to provide service was limited by § 25 of the General Rules and Regulations, the Electric Service Tariff, on file with the Pennsylvania Public Utility Commission, to provision of such service only to “customers” defined as “(a)ny person(s) . . . lawfully receiving service from (the) Company.” Petitioner, as the Court notes, ceased being a “customer” in September 1970 when her account was terminated for nonpayment of bills. That termination was pursuant to Rule 15 of the tariff quoted by the Court in n.1. From September 1970 to September 1971, respondent's “customer” was James Dodson; and his delinquency in payment for service during that period, not petitioner's delinquency before September 1970, was the occasion for the termination of service on October 11, 1971. . . . I would therefore intimate no view upon the correctness of the holdings below whether the termination of service on October 11, 1971, constituted state action but would vacate the judgment of the Court of Appeals with direction that the case be remanded to the District Court with instruction to enter a new judgment dismissing the complaint. See Golden v. Zwickler, 394 U.S. 103, 109-110 (1969).
I agree with my Brother Brennan that this case is a very poor vehicle for resolving the difficult and important questions presented today. The confusing sequence of events leading to the challenged termination makes it unclear whether petitioner has a property right under state law to the service she was receiving from the respondent company. Because these complexities would seriously hamper resolution of the merits of the case, I would dismiss the writ as improvidently granted. Since the Court has disposed of the case by finding no state action, however, I think it appropriate to register my dissent on that point.

The Metropolitan Edison Co. provides an essential public service to the people of York, Pa. It is the only entity public or private, that is authorized to supply electric service to most of the community. As a part of its charter to the company, the State imposes extensive regulations, and it cooperates with the company in myriad ways. Additionally, the State has granted its approval to the company's mode of service termination—the very conduct that is challenged here. Taking these factors together, I have no difficulty finding state action in this case. As the Court concluded in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the State has sufficiently “insinuated itself into a position of interdependence with (the company) that it must be recognized as a joint participant in the challenged activity.”

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**Blum v. Yaretsky**  
457 US. 991 (1982)

Justice REHNQUIST delivered the opinion of the Court.

Respondents represent a class of Medicaid patients challenging decisions by the nursing homes in which they reside to discharge or transfer patients without notice or an opportunity for a hearing. The question is whether the State may be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment.

Congress established the Medicaid program in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., (1976 ed. and Supp.IV), to provide federal financial assistance to States that choose to reimburse certain medical costs incurred by the poor. As a participating State, New York provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either “skilled nursing facilities” (SNF's) or “health related facilities” (HRF's). The latter provide less extensive, and generally less expensive, medical care than the former. Nursing homes chosen by Medicaid patients are directly reimbursed by the State for the reasonable cost of health care services, N.Y.Soc.Serv.Law § 367-a.1 (McKinney Supp.1981).

At the time their complaint was filed, respondents Yaretsky and Cuevas were patients in the American Nursing Home, an SNF located in New York City. Both were recipients of assistance under the Medicaid program. In December 1975 the nursing home's URC decided that respondents did not need the care they were receiving and should be transferred to a lower level of care in an
HRF. New York City officials, who were then responsible for administering the Medicaid program in the city, were notified of this decision and prepared to reduce or terminate payments to the nursing home for respondents' care. Following administrative hearings, state social service officials affirmed the decision to discontinue benefits unless respondents accepted a transfer to an HRF providing a reduced level of care.

Respondents then commenced this suit, acting individually and on behalf of a class of Medicaid-eligible residents of New York nursing homes. Named as defendants were the Commissioners of the New York Department of Social Services and the Department of Health. Respondents alleged in part that the defendants had not afforded them adequate notice either of URC decisions and the reasons supporting them or of their right to an administrative hearing to challenge those decisions. Respondents maintained that these actions violated their rights under state and federal law and under the Due Process Clause of the Fourteenth Amendment. They sought injunctive relief and damages.

Faithful adherence to the “state action” requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint. In this case, respondents objected to the involuntary discharge or transfer of Medicaid patients by their nursing homes without certain procedural safeguards. They have named as defendants state officials responsible for administering the Medicaid program in New York. These officials are also responsible for regulating nursing homes in the State, including those in which respondents were receiving care. But respondents are not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.

First, although it is apparent that nursing homes in New York are extensively regulated, “[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.” Jackson v. Metropolitan Edison Co., 419 U.S., at 350. The complaining party must also show that “there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” Id., at 351. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Flagg Bros., Inc. v. Brooks, supra, 436 U.S. at 166; Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 357; Moose Lodge No. 107 v. Irvis, supra, 407 U.S. at 173; Adickes v. S. H. Kress & Co., supra, 398 U.S. at 170. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those
initiatives under the terms of the Fourteenth Amendment. See Flagg Bros., supra, 436 U.S. at 164-165; Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 357.

Third, the required nexus may be present if the private entity has exercised powers that are “traditionally the exclusive prerogative of the State.” Jackson v. Metropolitan Edison Co., supra, at 353; see Flagg Bros., Inc. v. Brooks, supra, 436 U.S. at 157-161.

Analyzed in the light of these principles, the Court of Appeals' finding of state action cannot stand. The court reasoned that state action was present in the discharge or transfer decisions implemented by the nursing homes because the State responded to those decisions by adjusting the patient's Medicaid benefits. Respondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it responsible for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Respondents next point to regulations which, they say, impose a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate. One regulation excludes from participation in the Medicaid program health care providers who “[f]urnished items or services that are substantially in excess of the beneficiary's needs.” 42 CFR § 420.101(a)(2) (1981). The State is also authorized to fine health care providers who violate applicable regulations. 10 NYCRR § 414.18 (1978). As we have previously concluded, however, those regulations themselves do not dictate the decision to discharge or transfer in a particular case. Consequently, penalties imposed for violating the regulations add nothing to respondents' claim of state action.

As an alternative position, respondents argue that even if the State does not command the transfers at issue, it reviews and either approves or rejects them on the merits. The regulations cited by respondents will not bear this construction. Although the State requires the nursing homes to complete patient care assessment forms and file them with state Medicaid officials, 10 NYCRR §§ 415.1(a), 420.1(b) (1978), and although federal law requires that state officials review these assessments, 42 CFR §§ 456.271, 456.372 (1981), nothing in the regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients, and petitioners specifically disclaim any such responsibility. Instead, the State is obliged to approve or disapprove continued payment of Medicaid benefits after a change in the patient's need for services. See 42 CFR § 435.916 (1981). Adjustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself.

Finally, respondents advance the rather vague generalization that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer of Medicaid patients. For this proposition they rely upon Burton
of the operating and capital costs of the facilities, payment of the medical expenses of more than 90% of the patients in the facilities, and the licensing of the facilities by the State, taken together convert the action of the homes into “state” action. But accepting all of these assertions as true, we are nonetheless unable to agree that the State is responsible for the decisions challenged by respondents. As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of Burton. Jackson v. Metropolitan Edison Co., 419 U.S., at 357-358. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

We are also unable to conclude that the nursing homes perform a function that has been “traditionally the exclusive prerogative of the State.” Jackson v. Metropolitan Edison Co., supra, at 353. Respondents' argument in this regard is premised on their assertion that both the Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services. The state constitutional provisions cited by respondents, however, do no more than authorize the legislature to provide funds for the care of the needy. See N.Y.Const., Art. XVII, §§ 1. They do not mandate the provision of any particular care, much less long-term nursing care. Similarly, the Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal moneys. 42 U.S.C. §§ 1396a(a)(13)(B), 1396d(a)(4)(A) (1976 ed. and Supp.IV). It does not require that the States provide the services themselves. Even if respondents' characterization of the State's duties were correct, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

Justice WHITE, concurring in the judgments.

The issue in Blum v. Yaretsky, No. 80–1952, is whether a private nursing home's decision to discharge or transfer a Medicaid patient satisfies the state-action requirement of the Fourteenth Amendment. To satisfy this requirement, respondents must show that the transfer or discharge is made on the basis of some rule of decision for which the state is responsible. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937. It is not enough to show that the State takes certain actions in response to this private decision. The rule of decision implicated in the actions at issue here appears to be nothing more than a medical judgment. This is the clear import of the majority's conclusion that the “decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State,” with which I agree.

Similarly, the allegations of the petitioners in Rendell-Baker v. Kohn, 457 U.S. 830 [(1982)], fail to satisfy the state-action requirement. In this case, the question of state-action focuses on an employment decision made by a private school that receives most its funding from public sources and is subject to state regulation in certain respects. For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put
forth by the State. As the majority states, “in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters.” 457 U.S., at 841. The employment decision remains, therefore, a private decision not fairly attributable to the state.

Accordingly, I concur in the judgments.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent. But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully, and consistently with the constitutional purpose, is rendered more, not less, important.

In deciding whether “state action” is present in the context of a claim brought under 42 U.S.C. § 1983 (1976 ed., Supp.IV), the ultimate determination is simply whether the § 1983 defendant has brought the force of the State to bear against the § 1983 plaintiff in a manner the Fourteenth Amendment was designed to inhibit. Where the defendant is a government employee, this inquiry is relatively straightforward. But in deciding whether “state action” is present in actions performed directly by persons other than government employees, what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken. “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.” Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). See Lugar v. Edmondson Oil Co., 457 U.S. 922, 939-942 [(1982)]. The Court today departs from the Burton precept, ignoring the nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action. But however correct the Court's tests may be in the abstract, they are worth nothing if they are not faithfully applied. Bolstered by its own preconception of the decisionmaking process challenged by respondents, and of the relationship between the State, the nursing home operator, and the nursing home resident, the Court subjects the regulatory scheme at issue here to only the most perfunctory examination. The Court thus fails to perceive the decisive involvement of the State in the private conduct challenged by the respondents.

The Court's analysis in this case is simple, but it is also demonstrably flawed, for it proceeds upon a premise that is factually unfounded. The Court first describes the decision to transfer a nursing home resident from one level of care to another as involving nothing more than a physician's independent assessment of the appropriate medical treatment required by that resident. Building upon that factual premise, the Court has no difficulty concluding that the State plays no decisive role in the transfer decision: By reducing the resident's benefits to meet the change in treatment prescribed, the State is simply responding to “medical judgments made by private parties according to professional standards that are not established by the State.” Ante, at 2788. If this were an accurate
characterization of the circumstances of this case, I too would conclude that there was no “state action” in the nursing home's decision to transfer. A doctor who prescribes drugs for a patient on the basis of his independent medical judgment is not rendered a state actor merely because the State may reimburse the patient in different amounts depending upon which drug is prescribed.

But the level-of-care decisions at issue in this case, even when characterized as the “independent” decision of the nursing home, see ante, at 2784, have far less to do with the exercise of independent professional judgment than they do with the State's desire to save money. To be sure, standards for implementing the level-of-care scheme established by the Medicaid program are framed with reference to the underlying purpose of that program – to provide needed medical services. And not surprisingly, the State relies on doctors to implement this aspect of its Medicaid program. But the idea of two mutually exclusive levels of care – skilled nursing care and intermediate care – embodied in the federal regulatory scheme and implemented by the State, reflects no established medical model of health care. On the contrary, the two levels of long-term institutionalized care enshrined in the Medicaid scheme are legislative constructs, designed to serve governmental cost-containment policies.

Ignoring the State's fiscal interest in the level-of-care determination, the Court proceeds to a cursory, and misleading, discussion of the State's involvement in the assignment of residents to particular levels of care. In my view, an accurate and realistic appraisal of the procedures actually employed in the State of New York leaves no doubt that not only has the State established the system of treatment levels and utilization review in order to further its own fiscal goals, but that the State prescribes with as much precision as is possible the standards by which individual determinations are to be made.

New York's regulations mandate that the nursing home operator shall

“admit a patient only on physician's orders and in accordance with the patient assessment criteria and standards as promulgated and published by the department (New York State LongTerm Care Placement Form [DMS–1] and New York State Numerical Standards Master Sheet [DMS–9]) . . . which shall include, as a minimum:

“(1) an assessment, performed prior to admission by or on behalf of the agency or person seeking admission for the patient, of the patient's level of care needs according to the patient assessment criteria and standards promulgated and published by the department.” 10 NYCRR § 415.1 (1978) (emphasis added).

The Court concludes with this assessment of the statutory scheme: “These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State.” Ante, at 2788.
The Court is wrong. As a fair reading of the relevant regulations makes clear, the State (and Federal Government) have created, and administer, the level system as a cost-saving tool of the Medicaid program. The impetus for this active program of review imposed upon the nursing home operator is primarily this fiscal concern. The State has set forth precisely the standards upon which the level-of-care determinations are to be made, and has delegated administration of the program to the nursing home operators, rather than assume the burden of administering the program itself. Thus, not only does the program implement the State's fiscal goals, but, to paraphrase the Court, “[t]hese requirements . . . make the State responsible for actual decisions to discharge or transfer particular patients.” See ante, at 2787-2788, n.18. Where, as here, a private party acts on behalf of the State to implement state policy, his action is state action.

For a recent hospital case, see Borrell v. Bloomsburg University, 870 F.3d 154 (3rd Cir. 2017) (private hospital that operated a joint Nurse Anesthetist clinical program with a public university not a state actor when student terminated for refusing to take drug test required by the hospital). An older case holding use of public funds to lend textbooks to a racially discriminatory private school was impermissible encouragement of school’s discriminatory practices is Norwood v. Harrison. 28

In NCAA v. Tarkanian, 29 the critical question was whether the University of Nevada-Las Vegas’ actions in disciplining basketball coach Jerry Tarkanian in compliance with NCAA rules and regulations transformed the NCAA’s rules and regulations into state action. The Court noted that the NCAA is comprised of roughly 960 public and private universities from all 50 states. Roughly half of these institutions are private universities, and half are public universities. The Court also noted that the NCAA’s membership is not comprised of institutions created primarily by any one state entity. Against this factual background, a 5-4 Court concluded:

It would be ironic indeed to conclude that the NCAA’s imposition of sanctions against UNLV – sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings – is fairly attributable to the State of Nevada. It would be more appropriate to conclude that UNLV has conducted its athletic program under the color of policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law. 30

In contrast, Justice White’s dissent, joined by Justices Brennan, Marshall, and O’Connor, concluded:

On the facts of the present case, the NCAA acted jointly with UNLV in suspending Tarkanian. First, Tarkanian was suspended for violations of NCAA rules, which UNLV embraced in its agreement with the NCAA. . . . Second, the NCAA and UNLV agreed that the NCAA would

28 413 U.S. 455, 466 (1973) (unanimous decision).
30 Id. at 199.
conduct the hearings concerning violations of its rules. . . . Third, the NCAA and UNLV agreed that the findings of fact made by the NCAA . . . would be binding on UNLV. 31

In contrast to Tarkanian, the Court has held that a state-wide, not-for-profit athletic association that regulated interscholastic sports among Tennessee public and private high schools was a state actor because of the pervasive entwinement with public institutions and officials. As the 5-4 Court noted in Brentwood Academy v. Tennessee Secondary School Athletic Association, 32 fully 84% of the members of the organization were public schools, and each of these public schools owed their creation to the state of Tennessee. These facts distinguished the case from Tarkanian.

Justice Thomas, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, dissented. Justice Thomas noted: “[The majority’s approach] could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools – not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties. I am not prepared to say that any private organization that permits public entities and public officials to participate acts as the State in anything or everything it does, and our state-action jurisprudence has never reached that far. The state-action doctrine was developed to reach only those actions that are truly attributable to the State, not to subject private citizens to the control of federal courts hearing §1983 actions.” 33

Similar to the 5-4 votes in Flagg Bros. and Lugar, discussed at § 15.3 n.26, more conservative Justices voted against finding state action in both Tarkanian and Brentwood Academy. More liberal Justices voted to find state action in both cases. The difference in the vote was Justice Blackmun did not find state action in 1988 in Tarkanian, while Justice Souter, who replaced Blackmun on the Court in 1989, did find state action in Brentwood Academy.

As a practical matter, the result of these two cases is that NCAA enforcement actions are not subject to a constitutional due process requirement of constitutionally adequate notice and hearing. They only have to follow whatever procedures are laid out in their governing documents. The soundness of the current NCAA enforcement system is naturally the subject of dispute. 34 The state athletic

31 Id. at 200-01 (White, J., joined by Brennan, J., Marshall, J. & O’Connor, J., dissenting).


33 Id. at 305, 315 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).

A state is not required by the federal Constitution to forbid private race discrimination, and it can repeal anti-discrimination laws in order to take a neutral position. However, if the state does something more than repeal existing anti-discrimination legislation, it may be found to have violated the Constitution. In these cases, state action is not really the question, since the passing of a state law or state constitutional amendment, whether by legislative action or referendum, is state action. The real question in these cases is whether the state action involves a purpose to discriminate against individuals on grounds of race, and thus triggers strict scrutiny under the Equal Protection Clause, addressed at § 20.4, or does not involve such a purpose, and thus triggers only minimum rationality review.

The cases are mentioned here because the lack of analytic rigor in some functional instrumentalist opinions meant that many of these cases were discussed by the Court as involving the question of state action – that is, would passing the law or amendment providing for no protection against discrimination involve the state in aiding private racial discrimination to an unconstitutional degree. Since the cases really involve the Equal Protection Clause issue of whether discriminatory purpose or intent can be established, as in *Reitman v. Mulkey*, 35 which involved repealing existing state anti-discrimination laws in housing, these cases are discussed under the Equal Protection Clause discriminatory intent analysis at § 20.4 nn.77-82. On April 24, 2014, the Supreme Court held in *Schuette v. Coalition to Defend Affirmative Action* 36 that a state repealing existing affirmative action programs in Michigan public education, employment, and contracting and adopting a ban on race-based affirmative action, either by statute or by constitutional amendment, was permissible and consistent with equal protection of the laws, as discussed at § 20.4 n.80.

35 387 U.S. 369 (1967) (article of California Constitution prohibiting state from denying right of any person to decline to sell, lease or rent his real property to such person as he in his absolute discretion chooses would involve state in private racial discriminations to an unconstitutional degree). See also Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (barring local school boards from requiring students to attend schools other than those nearest the students’ homes, unless ordered by a court of competent jurisdiction, declared unconstitutional).

CHAPTER 16: INDIVIDUAL RIGHTS AND THE CONSTITUTION

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§ 16.1 Introduction to Individual Rights Adjudication

Individual rights protections can be found in the original Constitution, the Bill of Rights, and later constitutional amendments. Article I, § 9 of the Constitution includes three provisions dealing with criminal defendant’s rights. They are the privilege of habeas corpus, the prohibition against bills of attainder, and the prohibition against ex post facto laws. Article III, § 3 provides limits on criminal proceedings involving treason. These are addressed at § 16.2. Article I, § 10, cl. 1 protects against states “impairing the Obligation of Contracts.” This is addressed at §§ 18.1-18.2.

To ensure ratification, supporters promised that they would draft a Bill of Rights. These provisions are addressed at § 16.3. It has been noted:

The omission of a Bill of Rights proved to be one of the most formidable stumbling blocks for the ratification of the Constitution and it became the unifying force of the anti-Federalists who were opposed to a strong central government and wished to defeat the Constitution. Faced with this development, the supporters . . . pledged that if the Constitution were adopted, the adoption of a Bill of Rights would be the first order of business for the new Congress. If the pledge were not kept, a new constitutional convention would be convened that could once again reargue the issue of redistribution of powers between the states and the national government.1

Jefferson similarly insisted that "a bill of rights is what the people are entitled to against every government on earth . . . and what no just government should refuse, or rest on inference."2

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1 Elizabeth F. Defeis, A Bill of Rights for the European Union, 11 ILSA J. Int'l & Comp. L. 471, 472 (2005). Professor Defeis noted that the “inclusion of the Charter of Fundamental Rights in the Draft Treaty Establishing a Constitution for Europe has a curious history that in some ways is similar to the history of the Bill of Rights of the United States Constitution.” Id. at 471.

As of 2014, seventeen additional constitutional Amendments have been proposed by Congress and ratified by 3/4 of the states since the original 10 Bill of Rights provisions. These are addressed at § 16.4. Under Article V in the Constitution, constitutional amendments become valid when proposed by 2/3 of both Houses of Congress and then ratified by the legislatures in 3/4 of the states (or constitutional conventions in 3/4 of the states), or when 2/3 of the states call for a Constitutional Convention and then ratified by 3/4 of the states. No Constitutional Convention has ever been called in our Nation’s history, and all amendments have been ratified by the legislatures of the states.

§ 16.2 Individual Rights in the Original Constitution

1. Privilege of Habeas Corpus

Article 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.” As part of Article I of the Constitution, this suggests that only Congress can suspend the writ, not the President by unilateral action, as discussed at § 12.3 nn.24-32, unless an emergency situation exists where Congress cannot meet and act in time, as suggested at § 12.1 n.8 & § 12.2 n.15.

There is a difference between instrumentalist and non-instrumentalist approaches to habeas corpus. As has been noted: “In the early 1960s, the Supreme Court adopted generous standards governing federal habeas petitions by state prisoners. At that time, the Court suggested, rather surprisingly, that its solicitude toward such petitions might be constitutionally mandated by the Suspension Clause, the only provision in the Constitution that explicitly refers to the ‘Writ of Habeas Corpus.’ Now, thirty years later, . . . the constitutional argument appears to have been entirely abandoned.”

In recent cases, the Court has deferred to legislative judgments concerning the extent of habeas relief. Regarding the extent of Congress’ power over the writ of habeas corpus, it has been noted:


[In] its first effort to establish federal habeas jurisdiction, the Judiciary Act of 1789, Congress emphatically limited habeas review to prisoners in federal custody. Over forty years later, in the wake of states' resistance to federal taxes, Congress permitted federal courts to issue writs for federal officers held in state custody. But it was not until 1867, more than three-quarters of a century after the Framers adopted the Constitution and the First Congress gave life to the federal judiciary, that Congress chose to extend the writ generally to state prisoners. Given this history, a proponent of broad federal habeas review of state criminal convictions faces seemingly insurmountable obstacles in asserting a constitutional basis for such jurisdiction.5

Under current federal law, 28 U.S.C. § 2254(d), an application for a writ of habeas corpus “on behalf of a person in custody pursuant to the judgment of a State court shall not be granted 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” In applying this test, conservative formalist and Holmesian Justices are more likely to defer to state proceedings, while liberal instrumentalist Justices are more likely to conclude some decision was “unreasonable.”6

The deference given to state proceedings in federal habeas corpus cases is confirmed by a host of recent Supreme Court opinions.7 Where the habeas action involves an allegation of ineffective

convictions used to enhance sentence, unless convictions obtained in violation of the right to counsel); id. at 387-91 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting) (statute does provide for habeas action to be brought); id. at 392-93 (Breyer, J., dissenting) (courts should presume Congress intended habeas action where statute is silent on the matter); Lackawanna Cty. District Attorney v. Coss, 532 U.S. 394, 396-97 (2001) (extending Daniels to deny post-conviction relief through habeas corpus to a state prisoner under 28 U.S.C. § 2254); id. at 408 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting) (Daniels was in error and should not be extended); id. at 410 (Breyer, J., dissenting) (case should be remanded for review in light of Daniels).

5 Steiker, supra note 3, at 863-65.

6 See, e.g., Yarborough v. Alvarado, 541 U.S. 652, 660-66 (2004) (conclusion that 17-year old suspect was not in custody under Miranda not unreasonable); id. at 669-70 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) (suspect “clearly” in custody).

7 See Nevada v. Jackson, 133 S. Ct. 1900 (2013) (state supreme court reasonably applied federal law when it determined that petitioner was not denied a right to present a complete defense when he was barred from presenting extrinsic evidence of victim’s prior accusations of sexual assault); Metrish v. Lancaster, 133 S. Ct. 1781 (2013) (not violation of clearly established law to reject state prisoner’s claim that retroactive application to him of a state supreme court decision abolishing diminished capacity as a defense to first-degree murder violated his due process rights); Marshall v. Rodgers, 133 S. Ct. 1446 (2013) (when criminal defendant waives Sixth Amendment
right to counsel at trial, it is not a violation of clearly established law for judge to possess broad discretion to deny post-trial request for counsel); Johnson v. Williams, 133 S. Ct. 1088 (2013) (when defendant in state court attempted to raise a federal claim, and the state court ruled against him in an opinion that addressed some issues but did not expressly address the federal claim, federal courts on habeas review should presume, subject to rebuttal, that the federal claim was addressed, and thus standard habeas deference applies); Ryan v. Gonzales, 133 S. Ct. 696 (2013) (lack of competence of state criminal defendant does not require suspension of federal habeas proceeding); Parker v. Mathews, 132 S. Ct. 2148 (2012) (in habeas cases challenging sufficiency of the evidence, deference must be given both to the jury and to the state court’s consideration of whether the jury’s verdict was not heard on the merits. Following a literal approach would produce a “perverse” result. Without regard to literal versus purposive interpretation, there is a due process limit on Congress limiting the habeas right in the absence of suspension, as discussed in Hamdi v. Rumsfeld, excerpted at § 12.4.1, and Boumedienne v. Bush, discussed at § 12.4.2 nn.44-52.

Where the issue involves purpose versus literalism, Holmesian, natural law, and instrumentalist Justices can usually be found on one side, and formalist Justices, like Justices Scalia and Thomas, on the other side. In Stewart v. Martinez-Villareal,9 the majority held that petitioner’s claim, raised for a second time after the first claim was dismissed as not ripe, was not a “second” application barred by the Antiterrorism and Effective Death Penalty Act, because the first application was not heard on the merits. Following a literal approach would produce a “perverse” result. Without regard to literal versus purposive interpretation, there is a due process limit on Congress limiting the habeas right in the absence of suspension, as discussed in Hamdi v. Rumsfeld, excerpted at § 12.4.1, and Boumedienne v. Bush, discussed at § 12.4.2 nn.44-52.

8 See Martinez v. Ryan, 132 S. Ct. 1309 (2012) (habeas review not barred from hearing claim of ineffective assistance of counsel at trial if, in state court’s initial review of ineffective assistance, there was no counsel or counsel in that proceeding was ineffective); id. at 1321 (Scalia, J., joined by Thomas, J., dissenting); Maples v. Thomas, 132 S. Ct. 912 (2012) (state prisoner whose pro bono attorneys abandoned him without notice which resulted in missing a deadline for filing demonstrated cause to excuse that default); id. at 929 (Scalia, J., joined by Thomas, J., dissenting). Actual innocence, if proved, serves as a gateway through which a federal habeas petitioner may pass despite not only a procedural bar, but also expiration of a statute of limitations. McQuiggin v. Perkins, 133 S. Ct. 1924 (2013); id. at 1937 (Scalia, J., joined by Roberts, C.J., and Thomas, J., and Alito, J., as to Parts I, II, and III, dissenting).

9 523 U.S. 637, 643-44 (1998); id. at 646 (Scalia, J., joined by Thomas, J., dissenting).
2. Prohibition of Bills of Attainder

Article I, § 9, cl. 3 provides, “No Bill of Attainder or ex post facto Law shall be passed.” As defined by the Court, the categorical rule against Bills of Attainder requires that the act constitute “legislative punishment of an identifiable individual.” Thus, the act must be “legislative”; it must be directed against “an identifiable individual”; it must constitute “punishment.” Each of these elements must be met independently of the others for the act to be unconstitutional.

In determining whether an act constitutes “punishment” under the Bill of Attainder Clause, the Court has rejected a literal approach, in favor of considering purpose, history, practice, and precedent. Thus, the Court asks whether the law can be said reasonably to further punitive or non-punitive purposes. The Court considers whether any particular punishment is similar to the historical punishments of “imprisonment, banishment, and the punitive confiscation of property by the sovereign, [or] a legislative enactment barring designated individuals or groups from participation on specified employments or vocations, a mode of punishment commonly employed against those legislatively banded as disloyal.” The Court also looks to legislative motivation, and the existence of less burdensome alternatives by which the legislature could have achieved non-punitive goals, to determine whether any particular act is appropriately viewed as punitive in nature.

In United States v. Brown, the Court held that a federal statute which made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union, except in a clerical or custodial position, was an unconstitutional Bill of Attainder. For the liberal instrumentalist majority, Chief Justice Warren noted, “The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature.” In this case, Congress did not merely promulgate a rule, but rather Congress determined for itself that members in the Communist Party are more likely to incite political strikes. Reflecting the Holmesian predisposition to defer to government unless the unconstitutionality of the action is clear, noted at § 1.1.2 n.9, Holmesian Justices White, Clark, Harlan, and Stewart dissented on the grounds that there was not clear proof to establish that Congress' purpose in enacting the statute was punitive rather than regulatory.

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11 Id. at 474.
12 Id. at 475-83.
14 Id. at 462-64, 474-76 (White, J., joined by Clark, Harlan & Stewart, JJ., dissenting).
In *Nixon v. Administrator of General Services*, excerpted below, the Court held that the Presidential Recordings and Materials Preservation Act of 1974, which authorized the Administrator of General Services to take custody of the Presidential papers and tape recordings of former President Richard M. Nixon, but no other President, was not a Bill of Attainder.

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**Nixon v. Administrator of General Services**

433 U.S. 425 (1977)

Justice BRENNAN delivered the opinion of the Court.

Title I of Pub. L. 93-526, 88 Stat. 1695, note following 44 U.S.C. § 2107 (1970 ed., Supp. V), the Presidential Recordings and Materials Preservation Act (hereafter Act), directs the Administrator of General Services, official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) the separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

[Ed.: The Court first decided that the Act violated no separation of powers or First Amendment principle. The separation of powers aspect of this decision is addressed at § 10.4.1 n.53.]

Finally, we address appellant's argument that the Act constitutes a bill of attainder proscribed by Art. I, § 9, of the Constitution. His argument is that Congress acted on the premise that he had engaged in “misconduct,” was an “unreliable custodian” of his own documents, and generally was deserving of a “legislative judgment of blameworthiness,” Brief for Appellant 132-133. Thus, he argues, the Act is pervaded with the key features of a bill of attainder: a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. See United States v. Brown, 381 U.S. 437, 445, 447 (1965); United States v. Lovett, 328 U.S. 303, 315-316 (1946); Cummings v. Missouri, [71 U.S. (4 Wall.)] 277, 323 (1867).

Appellant's argument relies almost entirely upon *United States v. Brown*, supra, the Court's most recent decision addressing the scope of the Bill of Attainder Clause. It is instructive, therefore, to sketch the broad outline of that case. Brown invalidated § 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 504, that made it a crime for a Communist Party member to serve as an officer of a labor union. After detailing the infamous history of bills of attainder, the Court found that the Bill of Attainder Clause was an important ingredient of the doctrine of “separation of powers,” one of the organizing principles of our system of government. 381 U.S., at 442-443. Just as Art. III confines the Judiciary to the task of adjudicating concrete “cases or controversies,” so too the Bill of Attainder Clause was found to “reflect . . . the Framers' belief that
the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.” 381 U.S., at 445. Brown thus held that § 504 worked a bill of attainder by focusing upon easily identifiable members of a class members of the Communist Party and imposing on them the sanction of mandatory forfeiture of a job or office, long deemed to be punishment with the contemplation of the Bill of Attainder Clause. See, e.g., United States v. Lovett, supra, 328 U.S., at 316.

Brown, Lovett, and earlier cases unquestionably gave broad and generous meaning to the constitutional protection against bills of attainder. But appellant's proposed reading is far broader still. In essence, he argues that Brown establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality. The Act in question therefore is faulted for singling out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment.

Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. United States v. Lovett, supra, 328 U.S., at 324 (Frankfurter, J., concurring).

Thus, in the present case, the Act's specificity – the fact that it refers to appellant by name – does not automatically offend the Bill of Attainder Clause. Indeed, viewed in context, the focus of the enactment can be fairly and rationally understood. It is true that Title I deals exclusively with appellant's papers. But Title II casts a wider net by establishing a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials. In this light, Congress' action to preserve only appellant's records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention. The Presidential papers of all former Presidents from Hoover to Johnson were already housed in functioning Presidential libraries. Congress had reason for concern solely with the preservation of appellant's materials, for he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by its terms called for the destruction of certain of the materials. Indeed, as the federal appellees argue, “appellant's depository agreement . . . created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die.” Brief for Federal Appellees 41. In short, appellant constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors.
Moreover, even if the specificity element were deemed to be satisfied here, the Bill of Attainder Clause would not automatically be implicated. Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire further whether Congress, by lodging appellant's materials in the custody of the General Services Administration pending their screening by Government archivists and the promulgation of further regulations, “inflict[ed] punishment” within the constitutional proscription against bills of attainder. United States v. Lovett, 328 U.S., at 315; see also United States v. Brown, supra, 381 U.S., at 456-460.

The infamous history of bills of attainder is a useful starting point in the inquiry whether the Act fairly can be characterized as a form of punishment leveled against appellant. For the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art. I, § 9. A statutory enactment that imposes any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect.

In England a bill of attainder originally connotated a parliamentary Act sentencing a named individual or identifiable members of a group to death. Article I, § 9, however, also proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution. United States v. Lovett, supra, 328 U.S., at 323-324 (Frankfurter, J., concurring); Cummings v. Missouri, supra, 4 Wall. at 323; Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p. 97 (1956). Generally addressed to persons considered disloyal to the Crown or State, “pains and penalties” historically consisted of a wide array of punishments: commonly included were imprisonment, banishment, and the punitive confiscation of property by the sovereign. Our country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal. See, e.g., Cummings v. Missouri, supra (barring clergymen from ministry in the absence of subscribing to a loyalty oath); United States v. Lovett, supra (barring named individuals from Government employment); United States v. Brown, supra (barring Communist Party members from offices in labor unions).

Needless to say, appellant cannot claim to have suffered any of these forbidden deprivations at the hands of the Congress. While it is true that Congress ordered the General Services Administration to retain control over records that appellant claims as his property, § 105 of the Act makes provision for an award by the District Court of “just compensation.” This undercuts even a colorable contention that the Government has punitively confiscated appellant's property, for the “owner (thereby) is to be put in the same position monetarily as he would have occupied if his property has not been taken.” United States v. Reynolds, 397 U.S. 14, 16 (1970); accord, United States v. Miller, 317 U.S. 369, 373 (1943).

But our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has
never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. Cummings v. Missouri, 4 Wall., at 319-320; Hawker v. New York, 170 U.S. 189, 193-194 (1898); Dent v. West Virginia, 129 U.S. 114, 128 (1889); Trop v. Dulles, 356 U.S. 86, 96-97 (1958) (plurality opinion); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Application of the functional approach to this case leads to rejection of appellant's argument that the Act rests upon a congressional determination of his blameworthiness and a desire to punish him. For, as noted previously, legitimate justifications for passage of the Act are readily apparent. First, in the face of the Nixon-Sampson agreement which expressly contemplated the destruction of some of appellant's materials, Congress stressed the need to preserve “information included in the materials of former President Nixon (that) is needed to complete the prosecutions of Watergate-related crimes.” H.R. Rep. No. 93-1507, p.2 (1974). Second, again referring to the Nixon-Sampson agreement, Congress expressed its desire to safeguard the “public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance.” Ibid.

A third recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish. See, e.g., United States v. Lovett, 328 U.S., at 308-314, 314; Kennedy v. Mendoza-Martinez, supra, 372 U.S., at 169-170. The District Court unequivocally found: "There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a penalty upon Mr. Nixon . . . as punishment for alleged past wrongdoings. . . . The legislative history leads to only one conclusion, namely, that the Act before us is regulatory and not punitive in character.” 408 F.Supp., at 373 (emphasis omitted). We find no cogent reason for disagreeing with this conclusion.

Chief Justice BURGER, dissenting.

Under Art. I, § 9, cl. 3, as construed and applied by this Court since the time of Mr. Chief Justice Marshall, Title I violates the Bill of Attainder Clause.

Chief Justice Marshall firmly settled the matter in 1810, holding that legislative punishment in the form of a deprivation of property was prohibited by the Bill of Attainder Clause: “A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.” Fletcher v. Peck, 6 Cranch 87, 138.

The same point was made 17 years later in Ogden v. Saunders, 12 Wheat. 213, 286, where the Court stated: “By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property.”
More than 100 years ago this Court struck down statutes which had the effect of preventing defined categories of persons from practicing their professions. Cummings v. Missouri, [71 U.S. (4 Wall.)] 277 (1867) (a priest); Ex parte Garland, [71 U.S. (4 Wall.)] 333 (1867) (a lawyer). Those two cases established more broadly that “punishment” for purposes of bills of attainder is not limited to criminal sanctions; rather, “[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment . . . .” Cummings, supra, at 320.

Chief Justice Warren pointed out that the Constitution, in prohibiting bills of attainder, did not envision “a narrow, technical (and therefore soon to be outmoded) prohibition . . . .” United States v. Brown, 381 U.S. 437, 442 (1965). To the contrary, the evil was a legislatively imposed deprivation of existing rights, including property rights, directed at named individuals. Mr. Justice Black, in United States v. Lovett, 328 U.S. 303, 315-316 (1946), stated: “[The cases] stand for the proposition that 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 are bills of attainder prohibited by the Constitution.” (Emphasis supplied.)

The only “punishment” in Lovett, in fact, was the deprivation of Lovett's salary as a Government employee an indirect punishment for his “bad” associations.

Under our cases, therefore, bills of attainder require two elements: first, a specific designation of persons or groups as subjects of the legislation, and, second, a Garland-Cummings-Lovett-Brown-type arbitrary deprivation, including deprivation of property rights, without notice, trial, or other hearing. No one disputes that Title I suffers from the first infirmity, since it applies only to one former President. The issue that remains is whether there has been a legislatively mandated deprivation of an existing right.

Since George Washington's Presidency, our constitutional tradition, without a single exception, has treated Presidential papers as the President's personal property. This view has been congressionally and judicially ratified, both as to the ownership of Presidential papers, Folsom v. Marsh, 9 Fed. Cas. 342 (Mo. 4, 901) (CC Mass.1841) (Story, J., sitting as Circuit Justice), and, by the practice of Justices as to ownership of their judicial papers.

Even more starkly, Title I deprives only one former President of the right vested by statute in other former Presidents by the 1955 Act the right to have a Presidential library at a facility of his own choosing for the deposit of such Presidential papers as he unilaterally selects. Title I did not purport to repeal the Presidential Libraries Act; that statute remains in effect, available to present and future Presidents, and has already been availed of by former President Ford. The operative effect of Title I, therefore, is to exclude, by name, one former President and deprive him of what his predecessors and his successor have already been allowed. . . .

The remaining question, then, is whether appellant's “uniqueness” permits individualized legislation of the sort passed here. It does not. The point is not that Congress is powerless to act as to exigencies arising during or in the immediate aftermath of a particular administration; rather, the point is that Congress cannot punish a particular individual on account of his “uniqueness.” If Congress had
declared forfeited appellant's retirement pay to which he otherwise would be entitled, instead of confiscating his Presidential materials, it would not avoid the bill-of-attainder prohibition to say that appellant was guilty of unprecedented actions setting him apart from his predecessors in office. In short, appellant's uniqueness does not justify serious deprivations of existing rights.

[Justice REHNQUIST, along with Chief Justice BURGER, dissented on grounds the Act violated separation of powers, compromising presidential need for confidentiality, as noted at § 10.4.1 n.53.]

3. **Prohibition of Ex Post Facto Laws**

Article I, § 9, cl. 3 of the Constitution provides, in its other part, “No . . . ex post facto Law shall be passed.” In 1798, in *Calder v. Bull*, the Supreme Court held that this clause applied only to criminal laws. Justice Chase gave the classic definition of an ex post facto law. He stated:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.15

In reaching this conclusion, Justice Chase acknowledged that a literal interpretation of “ex post facto” would hold that any law, civil or criminal, that had any retroactive application would be banned by this clause. However, Chase stated that the clause was to be read in light of its purpose, the maxim that technical words are to be interpreted technically, and history. He noted:

The expressions “ex post facto laws,” are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors. The celebrated and judicious Sir William Blackstone, in his commentaries, considers an ex post facto law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson; and by the author of the Federalist, who I esteem superior to both, for his extensive and accurate knowledge of the true principles of Government.

I also rely greatly on the definition, or explanation of Ex Post Facto Laws, as given by the Conventions of Massachusetts, Maryland, and North Carolina; in their several Constitutions, or forms of Government. In the declaration of rights, by the convention of Massachusetts, part 1st. sect. 24, “Laws made to punish actions done before the existence of such laws, and which have not been declared CRIMES by preceding laws, are unjust, etc.” In the declaration of rights, by the convention of Maryland, art. 15th, “Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, etc.”

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15 3 U.S. (3 Dall.) 386, 390 (1798).
the declaration of rights by the convention of North Carolina, art. 24th, I find the same
definition, precisely in the same words, as in the Maryland constitution.\footnote{16}

The same split between the natural law approach’s greater focus on purpose versus the formalist
greater focus on literal meaning has been evident in cases decided under the Ex Post Facto Clause
or Due Process Clause. For example, in \textit{Rogers v. Tennessee},\footnote{17} Justice O’Connor wrote for the
Court that the purpose behind the Ex Post Facto Clause and Due Process Clause to assure “fair
warning” before an individual is convicted for a crime was not violated when the Tennessee
Supreme Court abolished retroactively the common law “year and a day rule” which provided that
no defendant could be convicted of murder unless his victim had died by the defendant's act within
a year and a day of the act. As the majority noted, the case involved only a Due Process analysis,
as the Ex Post Facto Clause only applies to legislative action, not common-law decisions by courts.
In dissent, Justice Scalia noted that literally this result permitted the Court to approve “the
conviction of a man for murder that was not murder (but only manslaughter) when the offense was
committed.” Justice Scalia’ dissent was joined not only by Justice Thomas, but also by Justices
Stevens and Breyer, in part, as their separate dissents pointed out, because of instrumentalist social
policy reasons that “the majority has undervalued the threat to liberty that is posed whenever the
criminal law is changed retroactively,” and by failing to consider “‘considerations of convenience,
of utility, and of the deepest sentiments of justice.’”\footnote{18}

\footnote{16} \textit{Id}. at 391-92. While incarceration usually is indicative of criminal punishment, individuals
imprisoned as a collateral consequence of failure to pay a civil obligation, such as failure to pay a
fine, restitution, or court costs, particularly when on probation or parole, or denied restoration of
voting rights for similar failure to pay a civil obligation, see generally Ann Cammett, \textit{Shadow
Citizens, Felony Disenfranchisement and the Criminalization of Debt}, 117 Penn. St. L. Rev. 349,
381-95 (2012), citing, \textit{inter alia}, Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010), do not trigger
ex post facto considerations, unless the punishment is viewed as quasi-criminal in nature. See In Re
Clifford Hall, 2014 WL 2420972 (14th Tex. Ct. App. – Houston, 2014) (family law contempt
proceedings are quasi-criminal in nature; ex post facto analysis applies). Statutes retroactively
requiring sex offenders to register as part of recently enacted community notification programs are
typically viewed as remedial to protect society, not punitive/criminal. Smith v. Doe, 538 U.S. 84,
105-06 (2003). \textit{See also} Doe v. Miller, 405 F.3d 700, 718-23 (8th Cir. 2005) (retroactively
prohibiting a person convicted of sexual offenses against minors from establishing residence within
2,000 feet of school or registered child care facility not ex post facto law, as law enacted to protect
health and safety of Iowa citizens, rather than punitive). \textit{But see} Doe v. State, 111 A.3d 1077 (N.H.
2015) (amendments to sex offender registration scheme requiring offenders convicted before the
data of the amendments to register for life without any possibility of judicial review makes scheme
punitive and violates New Hampshire’s Ex Post Facto Clause).

\footnote{17} 532 U.S. 451, 462-67 (2001).

\footnote{18} \textit{Id}. at 467 (Scalia, J., joined by Stevens, Breyer & Thomas, JJ., dissenting); \textit{id}. at 467
(Stevens, J., dissenting); \textit{id}. at 481 (Breyer, J, dissenting), \textit{citing} BENJAMIN CARDOZO, \textit{THE NATURE
OF THE JUDICIAL PROCESS} 148-49 (1921).
A case involving whether the law altered a “rule of evidence” under the Ex Post Facto Clause is *Carmell v. Texas*. In this case, a 5-Justice formalist and instrumentalist majority (the same four Justices who were in dissent in *Rogers*, joined by instrumentalist-leaning Justice Souter) concluded that a retroactive change permitting conviction for sexual assault or sexual abuse of a minor based on the uncorroborated testimony of the minor alone was an ex post facto law. A Holmesian and natural law dissent concluded that the law did not change the rule of evidence necessary to convict, but merely allowed the testimony of a minor between 14-18 to be considered credible, and thus was a mere procedural change not altering the rule of evidence.

4. The Treason Clause

Article III, § 3, cl. 1 provides: “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.” Article III, § 3, cl. 2 provides: “The Congress shall have the Power to declare the Punishment of Treason, but no Attainer of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”

The most famous application of this clause occurred during the treason trial of Aaron Burr in 1807. Dumped by President Jefferson as his Vice-Presidential running mate in 1804, Burr was accused of plotting to conquer Mexico and preside over a vast empire stretching from the Mississippi River (including most of the land added to the United States in the 1803 Louisiana Purchase) to the capital of Mexico. Chief Justice Marshall presided over the trial. At the end of the day, Burr was acquitted, in part because the jury was not clearly presented with two witnesses to an overt act of Treason committed by Burr, as opposed to statements and acts done by others ostensibly on behalf of Burr.


20 See generally R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION (2012); PETER CHARLES HOFFER, THE TREASON TRIALS OF AARON BURR (2008). No one was ever tried for treason after the end of the Civil War. Although a number of leading Confederates, including Confederate President Jefferson Davis and General Robert E. Lee were indicted, all received blanket amnesty through a presidential pardon by President Andrew Johnson, as referenced in *United States v. Klein*, excerpted at § 2.1.2.
§ 16.3 Individual Rights in the Bill of Rights

The first ten Amendments to the Constitution provide for a range of individual rights protections. Because of extensive litigation, the First Amendment protections are addressed separately at CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3: THE FIRST AMENDMENT (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials) (Chapters 1-10 on the freedom of speech, and of the press; Chapter 11 on the right to assemble and petition the government for grievances, and the related freedom of association; Chapters 12-13, the Establishment Clause; and Chapter 14, the Free Exercise Clause). In this Coursebook, the Fifth Amendment Due Process Clause, as applied to civil matters, is addressed in Chapters 17 & 28. The Fifth Amendment Takings Clause is addressed at §§ 18.3-18.4. The Ninth Amendment’s provision for rights not enumerated in the Constitution or Bill of Rights is addressed at § 25.1. The Tenth Amendment is addressed at § 8.1. Remaining Bill of Rights provisions are addressed below.

1. The Second Amendment: Right to Bear Arms

The Second Amendment provides: “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.” As with other provisions of the Bill of Rights considered in 1833 in Barron v. Baltimore, excerpted at § 14.3.1(A), the Court held in 1875 in United States v. Cruikshank,21 that the Second Amendment has “no other effect than to restrict the powers of the National Government.” This holding was reaffirmed on several occasions during the 19th century.22 However, these cases were decided before the Court began to hold that some provisions in the first eight Amendments were incorporated into the Due Process Clause of the 14th Amendment, beginning in 1897 with the Taking Clause, discussed at § 14.3.1(B) n.56. The Second Amendment was incorporated and made applicable against the states in 2010 in McDonald v. City of Chicago, excerpted at § 14.3.2.

For state legislation, 44 states have “right to arms” provisions in their state constitutions that almost always are read to provide an individual some right to own guns, and thus limit state legislation to some extent. Only California, Iowa, Maryland, Minnesota, New Jersey, and New York do not have such provisions in their state constitutions. Only Massachusetts treats its provision as referring to the right to bear arms as part of a state militia, not an individual right to own guns.23

Prior to 2008, the major Supreme Court case on the Second Amendment was United States v. Miller,24 decided during the Holmesian deference-to-government era in 1939. That case upheld as

21 92 U.S. 542, 552-53 (1875).
constitutional a federal statute that made it criminal to transport in interstate commerce a shotgun with a barrel less than 18 inches in length. The Court said the law did not violate the Second Amendment because: (1) there was “no evidence” that such a gun has a “reasonable relation to the preservation or efficiency of a well regulated militia,” and (2) the Court refused to hold as a matter of “judicial notice” that a sawed-off shotgun was part of “ordinary military equipment or that its use would contribute to the common defense.” Reflecting Holmesian emphasis on purpose in addition to literal text, the Court explained, “With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the militia] that declaration and guarantee of the Second Amendment was made. It must be interpreted and applied with that end in view.”

In District of Columbia v. Heller, a 5-4 Court held that the Second Amendment protects an individual right to keep and bear arms, and that right was violated by the District of Columbia’s prohibition on the possession of usable handguns in the home. In an opinion joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito, Justice Scalia went beyond mere formalist reliance on literal text and specific historical intent to include analysis of purpose, general historical materials, and legislative and executive practice – sources important to the Holmesian and natural law Justices in the majority (Chief Justice Roberts, Holmesian, and Justice Kennedy, natural law). Justice Stevens, dissenting with Justices Souter, Ginsburg, and Breyer, said that the text of the Second Amendment, the history of its adoption, and the decision in United States v. Miller, all indicate that the Amendment protects the right to keep and bear arms for military purposes, but does not limit the legislature’s power to regulate the nonmilitary use and ownership of weapons.26

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District of Columbia v. Heller
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Justice SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§ 22-4504(a), 22-4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities. See § 7-2507.02.

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26 Id. at 2822-24 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
The Second Amendment provides: “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.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” United States v. Sprague, 282 U.S. 716, 731 (1931); see also Gibbons v. Ogden, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11-12; post, at 2822 (Stevens, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2-4.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.

Operative Clause

a. “Right of the People.” The first salient feature of the operative clause is that it codifies a “right of the people.” The unamended Constitution and the Bill of Rights use the phrase “right of the people” two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). All three of these instances unambiguously refer to individual rights, not “collective” rights, or rights that may be exercised only through participation in some corporate body.

Three provisions of the Constitution refer to “the people” in a context other than “rights” – the famous preamble (“We the People”), § 2 of Article I (providing that “the people” will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with “the States” or “the people”). Those provisions arguably refer to “the people” acting collectively – but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a “right” attributed to “the people” refer to anything other than an individual right.

b. “Keep and bear Arms.” We move now from the holder of the right – “the people” – to the substance of the right: “to keep and bear Arms.”

Before addressing the verbs “keep” and “bear,” we interpret their object: “Arms.” The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined “arms” as “weapons of offence, or armour of defence.” 1 Dictionary of the English
Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined “arms” as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

We turn to the phrases “keep arms” and “bear arms.” Johnson defined “keep” as, most relevantly, “[t]o retain; not to lose,” and “[t]o have in custody.” Johnson 1095. Webster defined it as “[t]o hold; to retain in one's power or possession.” No party has apprised us of an idiomatic meaning of “keep Arms.” Thus, the most natural reading of “keep Arms” in the Second Amendment is to “have weapons.”

At the time of the founding, as now, to “bear” meant to “carry.” See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989) (hereinafter Oxford). When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose – confrontation. In Muscarello v. United States, 524 U.S. 125 (1998), in the course of analyzing the meaning of “carries a firearm” in a federal criminal statute, Justice Ginsburg wrote that “[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” Id., at 143 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed.1998)). We think that Justice Ginsburg accurately captured the natural meaning of “bear arms.” Although the phrase implies that the carrying of the weapon is for the purpose of “offensive or defensive action,” it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.” It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit.

Justice Stevens places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: “but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” Creating the Bill of Rights 12 (H. Veit, K. Bowling, & C. Bickford eds.1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the Second Amendment intended “bear Arms” to refer only to military service. See post, at 2836. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process. In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever – so much so that Quaker
frontiersmen were forbidden to use arms to defend their families, even though “[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming.” P. Brock, Pacifism in the United States 359 (1968); see M. Hirst, The Quakers in Peace and War 336-339 (1923); 3 T. Clarkson, Portraiture of Quakerism 103–104 (3d ed. 1807). The Pennsylvania Militia Act of 1757 exempted from service those “scrupling the use of arms” – a phrase that no one contends had an idiomatic meaning. See 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders eds. 1898) (emphasis added). Thus, the most natural interpretation of Madison's deleted text is that those opposed to carrying weapons for potential violent confrontation would not be “compelled to render military service,” in which such carrying would be required.

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.” As we said in United States v. Cruikshank, 92 U.S. 542, 553 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed . . . .”

Prefatory Clause. The prefatory clause reads: “A well regulated Militia, being necessary to the security of a free State . . . .”

a. “Well-Regulated Militia.” In United States v. Miller, 307 U.S. 174, 179 (1939), we explained that “the Militia comprised all males physically capable of acting in concert for the common defense.” That definition comports with founding-era sources. See, e.g., Webster (“The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations”); The Federalist No. 46, pp. 329, 334 (B. Wright ed.1961) (J. Madison) (“near half a million of citizens with arms in their hands”). Finally, the adjective “well-regulated” implies nothing more than the imposition of proper discipline and training. See Johnson 1619 (“Regulate”: “To adjust by rule or method”); Rawle 121-122; cf. Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814 (referring to “a well-regulated militia, composed of the body of the people, trained to arms”).

b. “Security of a Free State.” The phrase “security of a free state” meant “security of a free polity,” not security of each of the several States as the dissent below argued, see 478 F.3d, at 405, and n.10. Joseph Story wrote in his treatise on the Constitution that “the word ‘state’ is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community.” 1 Story § 208; see also 3 id., § 1890 (in reference to the Second Amendment's prefatory clause: “The militia is the natural defence of a free country”). It is true that the term “State” elsewhere in the Constitution refers to individual States, but the phrase “security of a free state” and close variations
seem to have been terms of art in 18th-century political discourse, meaning a “‘free country’” or free polity. See Volokh, “Necessary to the Security of a Free State,” 83 Notre Dame L.Rev. 1, 5 (2007); see, e.g., 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in The Essential Antifederalist 251, 253 (W. Allen & G. Lloyd eds., 2d ed.2002). Moreover, the other instances of “state” in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States – “each state,” “several states,” “any state,” “that state,” “particular states,” “one state,” “no state.” And the presence of the term “foreign state” in Article I and Article III shows that the word “state” did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be “necessary to the security of a free state.” See 3 Story § 1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary – an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed.1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

**Relationship between Prefatory Clause and Operative Clause**

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, e.g., Letters from The Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed.1981).

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right – unlike some other English rights – was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a “subsidiary interest” of the right to keep and bear arms, see post, at 2841, is profoundly mistaken. He bases that assertion solely upon the prologue – but that can only show that self-defense had little to do with the right's codification; it was the central component of the right itself.
Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them – Pennsylvania and Vermont – clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: “That the people have a right to bear arms for the defence of themselves, and the state . . . .” § XIII, in 5 Thorpe 3082, 3083 (emphasis added). In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization. See Vt. Const., ch. 1, § XV, in 6 id., at 3741.

North Carolina also codified a right to bear arms in 1776: “That the people have a right to bear arms, for the defence of the State . . . .” Declaration of Rights § XVII, in 5 id., at 2787, 2788. This could plausibly be read to support only a right to bear arms in a militia – but that is a peculiar way to make the point in a constitution that elsewhere repeatedly mentions the militia explicitly. See N.C. Const., §§ XIV, XVIII, XXXV, in 5 id., 2789, 2791, 2793. Many colonial statutes required individual arms-bearing for public-safety reasons – such as the 1770 Georgia law that “for the security and defence of this province from internal dangers and insurrections” required those men who qualified for militia duty individually “to carry fire arms” “to places of public worship.” 19 Colonial Records of the State of Georgia 137-139 (A. Candler ed.1911 (pt. 2)) (emphasis added). That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843. See State v. Huntly, 25 N.C. 418, 3 Ired. 418, 422-423.

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them – Kentucky, Ohio, Indiana, and Missouri – referred to the right of the people to “bear arms in defence of themselves and the State.” See n.8, supra. Another three States – Mississippi, Connecticut, and Alabama – used the even more individualistic phrasing that each citizen has the “right to bear arms in defence of himself and the State.” See ibid. Finally, two States – Tennessee and Maine – used the “common defence” language of Massachusetts. See Tenn. Const., Art. XI, § 26 (1796), in 6 Thorpe 3414, 3424; Me. Const., Art. I, § 16 (1819), in 3 id., at 1646, 1648. That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right.

Post-ratification Commentary

Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service.

St. George Tucker's version of Blackstone's Commentaries, as we explained above, conceived of the Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the Second Amendment. See 2 Tucker's Blackstone 143. In Note D, entitled, “View of the Constitution of the United States,” Tucker elaborated on the Second Amendment: “This may be considered as the true palladium of liberty . . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the
people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.” 1 id., at App. 300 (ellipsis in original). He believed that the English game laws had abridged the right by prohibiting “keeping a gun or other engine for the destruction of game.” Ibid.; see also 2 id., at 143, and nn.40 and 41.

In 1825, William Rawle, a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the Bill of Rights, published an influential treatise, which analyzed the Second Amendment as follows: “The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent . . . . The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.” Rawle 121-122.

Joseph Story published his famous Commentaries on the Constitution of the United States in 1833. Justice Stevens suggests that “[t]here is not so much as a whisper” in Story's explanation of the Second Amendment that favors the individual-rights view. Post, at 2840. That is wrong. Story explained that the English Bill of Rights had also included a “right to bear arms,” a right that, as we have discussed, had nothing to do with militia service. 3 Story § 1858. He then equated the English right with the Second Amendment: “§ 1891. A similar provision [to the Second Amendment] in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, ‘that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.’ But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.” (Footnotes omitted.)

This comparison to the Declaration of Right would not make sense if the Second Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected. As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, “[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.” Andrews v. State, 50 Tenn. 165, 183 (1871).

Pre-Civil War Case Law

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. In Houston v. Moore, 5 Wheat. 1, 24 (1820), this Court held that States have concurrent power over the militia, at least where not pre-empted by Congress. Agreeing in dissent that States could “organize, arm, and discipline” the militia in the absence of conflicting federal regulation, Justice Story said that the Second Amendment “may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.” Id., at 51-53. Of course, if the Amendment simply
“protect[ed] the right of the people of each of the several States to maintain a well-regulated militia,” post, at 2822 (Stevens, J., dissenting), it would have enormous and obvious bearing on the point. But the Court and Story derived the States’ power over the militia from the nonexclusive nature of federal power, not from the Second Amendment, whose preamble merely “confirms and illustrates” the importance of the militia. Even clearer was Justice Baldwin. In the famous fugitive-slave case of Johnson v. Tompkins, 13 F. Cas. 840, 850, 852 (CC Pa. 1833), Baldwin, sitting as a circuit judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has “a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection . . . of either.”

Post-Civil War Legislation

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. See generally S. Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876 (1998) (hereinafter Halbrook); Brief for Institute for Justice as Amicus Curiae. Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: “[T]he civil law [of Kentucky] prohibits the colored man from bearing arms . . . . Their arms are taken from them by the civil authorities . . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed.” H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236.

Post-Civil War Commentators

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations. Concerning the Second Amendment it said: “The alternative to a standing army is ‘a well-regulated militia,’ but this cannot exist unless the people are trained to bearing arms.” Id., at 350.

That Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms, is made even clearer in his 1880 work, General Principles of Constitutional Law. The Second Amendment, he said, “was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people.” Id., at 270.
Justice Stevens places overwhelming reliance upon this Court's decision in *United States v. Miller*, 307 U.S. 174, (1939). “[H]undreds of judges,” we are told, “have relied on the view of the amendment we endorsed there,” post, at 2823, and “[e]ven if the textual and historical arguments on both side of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law,” post, at 2824. And what is, according to Justice Stevens, the holding of *Miller* that demands such obeisance? That the Second Amendment “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons.” Post, at 2823.

Nothing so clearly demonstrates the weakness of Justice Stevens' case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were “bear [ing] arms” not “for . . . military purposes” but for “nonmilitary use,” post, at 2823. Rather, it was that the type of weapon at issue was not eligible for Second Amendment protection: “In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” 307 U.S., at 178 (emphasis added). “Certainly,” the Court continued, “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” Ibid. Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that “have some reasonable relationship to the preservation or efficiency of a well regulated militia”). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. Justice Stevens can say again and again that *Miller* did “not turn on the difference between muskets and sawed-off shotguns, it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns,” post, at 2845, but the words of the opinion prove otherwise. The most Justice Stevens can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General's argument (made in the alternative) that the right was collective, see Brief for United States, O.T.1938, No. 696, pp. 4-5. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever
purpose. See, e.g., Sheldon, in 5 Blume 346; Rawle 123; Pomeroy 152-153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, e.g., State v. Chandler, 5 La. Ann., at 489-490; Nunn v. State, 1 Ga., at 251; The American Students' Blackstone 84, n.11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. Miller said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” 307 U.S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.” See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New-York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271-272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also State v. Langford, 10 N.C. 381, 383-384 (1824); O'Neill v. State, 16 Ala. 65, 67 (1849); English v. State, 35 Tex. 473, 476 (1871); State v. Lanier, 71 N.C. 288, 289 (1874).

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

[Ed.: Prudential Social Policy Considerations]

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns [such as those noted above]. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some
think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But [that] conclusion . . . does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in United States v. Miller, 307 U.S. 174 (1939), provide a clear answer . . . .

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Sustaining an indictment under the Act, this Court held that, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” Miller, 307 U.S., at 178. The view of the Amendment we took in Miller – that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons – is both the most natural reading of the Amendment's text and the interpretation most faithful to [its] history.

Since our decision in Miller, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980. See Lewis v. United States, 445 U.S. 55, 65-66, n.8 (1980). No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers rejected proposals that would have broadened its coverage to include such uses.
The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment's text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller*; and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting), would prevent most jurists from endorsing such a dramatic upheaval in the law. As Justice Cardozo observed years ago, the “labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.” The Nature of the Judicial Process 149 (1921).

The text of the Second Amendment is brief. It provides: “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.” Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies. While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that “the people have a right to bear arms for the defence of themselves and the state,” 1 Schwartz 266 (emphasis added); § 43 of the Declaration ensured that “the inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed,” id., at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed “[t]hat the people have a right to bear arms for
the defence of themselves and the State.” Id., at 324 (emphasis added). The contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee “to keep and bear arms” was on military uses of firearms, which they viewed in the context of service in state militias.

The centerpiece of the Court's textual argument is its insistence that the words “the people” as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments.

The Court . . . overlooks the significance of the way the Framers used the phrase “the people” in these constitutional provisions. In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of “the people.” These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the words “the people” in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

As used in the Fourth Amendment, “the people” describes the class of persons protected from unreasonable searches and seizures by Government officials. It is true that the Fourth Amendment describes a right that need not be exercised in any collective sense. But that observation does not settle the meaning of the phrase “the people” when used in the Second Amendment. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the First Amendment. Although the abstract definition of the phrase “the people” could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase in the First and Second Amendments are the same in referring to a collective activity. By way of contrast, the Fourth Amendment describes a right against governmental interference rather than an affirmative right to engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the Second Amendment, the words “the people” do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

Although the Court's discussion of these words treats them as two “phrases” – as if they read “to keep” and “to bear” – they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.
The term “bear arms” is a familiar idiom; when used unadorned by any additional words, its meaning is “to serve as a soldier, do military service, fight.” 1 Oxford English Dictionary 634 (2d ed.1989). It is derived from the Latin *arma ferre*, which, translated literally, means “to bear [ferre] war equipment [arma].” Brief for Professors of Linguistics and English as *Amici Curiae* 19. One 18th-century dictionary defined “arms” as “weapons of offence, or armour of defence,” 1 S. Johnson, A Dictionary of the English Language (1755), and another contemporaneous source explained that “[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, & c. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive, on special occasions.” 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (1794). Had the Framers wished to expand the meaning of the phrase “bear arms” to encompass civilian possession and use, they could have done so by the addition of phrases such as “for the defense of themselves,” as was done in the Pennsylvania and Vermont Declarations of Rights. The unmodified use of “bear arms,” by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts. The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.

The Amendment's use of the term “keep” in no way contradicts the military meaning conveyed by the phrase “bear arms” and the Amendment's preamble. To the contrary, a number of state militia laws in effect at the time of the Second Amendment's drafting used the term “keep” to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that “every one of the said officers, non-commissioned officers, and privates, shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer.” Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2 (emphasis added). “[K]eep and bear arms” thus perfectly describes the responsibilities of a framing-era militia member.

With all of these sources upon which to draw, it is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the substance of the two provisions succinctly into one, which read: “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” Cogan 169.

Madison's decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.
Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text. Although records of the debate in the Senate, which is where the conscientious-objector clause was removed, do not survive, the arguments raised in the House illuminate the perceived problems with the clause: Specifically, there was concern that Congress “can declare who are those religiously scrupulous, and prevent them from bearing arms.” The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment – to protect against congressional disarmament, by whatever means, of the States' militias.

Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history. All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion.

The most significant of these commentators was Joseph Story. Contrary to the Court's assertions, however, Story actually supports the view that the Amendment was designed to protect the right of each of the States to maintain a well-regulated militia. When Story used the term “palladium” in discussions of the Second Amendment, he merely echoed the concerns that animated the Framers of the Amendment and led to its adoption. An excerpt from his 1833 Commentaries on the Constitution of the United States – the same passage cited by the Court in Miller [307 U.S. at 182] – merits reproducing at some length: “The importance of [the Second Amendment] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”

Story thus began by tying the significance of the Amendment directly to the paramount importance of the militia. He then invoked the fear that drove the Framers of the Second Amendment – specifically, the threat to liberty posed by a standing army. An important check on that danger, he suggested, was a “well-regulated militia,” id., at 621, for which he assumed that arms would have to be kept and, when necessary, borne. There is not so much as a whisper in the passage above that Story believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.

The Court suggests that by the post-Civil War period, the Second Amendment was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense.
While it is true that some of the legislative history on which the Court relies supports that contention, see ante, at 2809-2811, such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.

What is more, much of the evidence the Court offers is decidedly less clear than its discussion allows. The Court notes that “[b]lacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms.” Ante, at 2810. The Court hastily concludes that “[n]eedless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia,” ibid. But some of the claims of the sort the Court cites may have been just that. In some Southern States, Reconstruction-era Republican governments created state militias in which both blacks and whites were permitted to serve. Because “[t]he decision to allow blacks to serve alongside whites meant that most southerners refused to join the new militia,” the bodies were dubbed “Negro militia[s].” S. Cornell, A Well-Regulated Militia 176-177 (2006). The “arming of the Negro militias met with especially fierce resistance in South Carolina . . . . The sight of organized, armed freedmen incensed opponents of Reconstruction and led to an intensified campaign of Klan terror. Leading members of the Negro militia were beaten or lynched and their weapons stolen.” Id., at 177.

One particularly chilling account of Reconstruction-era Klan violence directed at a black militia member is recounted in the memoir of Louis F. Post, A “Carpetbagger” in South Carolina, 10 Journal of Negro History 10 (1925). Post describes the murder by local Klan members of Jim Williams, the captain of a “Negro militia company,” id., at 59, this way:“[A] cavalcade of sixty cowardly white men, completely disguised with face masks and body gowns, rode up one night in March, 1871, to the house of Captain Williams . . . in the wood [they] hanged [and shot] him . . . [and on his body they] then pinned a slip of paper inscribed, as I remember it, with these grim words: ‘Jim Williams gone to his last muster.’” Id., at 61.

In light of this evidence, it is quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarming of black militia members.

In 1901 the President revitalized the militia by creating “‘the National Guard of the several States,’” Perpich, 496 U.S., at 341, and nn. 9-10; meanwhile, the dominant understanding of the Second Amendment's inapplicability to private gun ownership continued well into the 20th century. The first two federal laws directly restricting civilian use and possession of firearms – the 1927 Act prohibiting mail delivery of “pistols, revolvers, and other firearms capable of being concealed on the person,” Ch. 75, 44 Stat. 1059, and the 1934 Act prohibiting the possession of sawed-off shotguns and machine guns – were enacted over minor Second Amendment objections dismissed by the vast majority of the legislators who participated in the debates. Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not infringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the Second Amendment.
Thus, for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial. Indeed, the Second Amendment was not even mentioned in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have “some reasonable relationship to the preservation or efficiency of a well regulated militia.” 307 U.S., at 178.

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights “enshrine[d]” in the Constitution. *Ante*, at 2822. But the right the Court announces was not “enshrined” in the Second Amendment by the Framers; it is the product of today's law-changing decision. The majority's exegesis has utterly failed to establish that as a matter of text or history, “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” is “elevate[d] above all other interests” by the Second Amendment. *Ante*, at 2822.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a “law-abiding, responsible citizen[n]” the right to keep and use weapons in the home for self-defense is “off the table.” *Ante*, at 2822. Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

Despite Justice Stevens’ concern in the last paragraph excerpted above, the decision in *District of Columbia v. Heller* may have limited impact, except for making unconstitutional very intrusive regulations regarding owning handguns or rifles. Only a few cities, like Chicago, had ordinances similar to the District of Columbia, and it is unclear how much those statutes, including the one in *Heller*, were enforced in practice. While *Heller* is an invitation to much litigation, its result may be similar to *Lopez* and *Morrison*. In those cases, the federal government went too far, but the cases have had little impact on the general power of Congress to regulate using the Commerce Clause, as discussed at § 6.4. nn.36-46. This prediction of a limited impact of *Heller* has been borne out so far.27 In some cases, however, the Second Amendment challenge has prevailed to place some

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27 See, e.g., *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2nd Cir. 2015) (ban on semi-automatic weapons and large-capacity magazines constitutional, while ban on 7-round load limit and non-semiautomatic shotgun unconstitutional); *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (San Francisco ordinance banning sale of hollow-point
limitations on legislative enactments. For further discussion of Second Amendment issues, including what standard of review should be applied to various regulations, see Charles D. Kelso & R. Randall Kelso, The Path of Constitutional Law (2007) (2018 Supplement at § 23.1.1, text following n.19) (pages 2073-75) (http://libguides.stcl.edu/kelsomaterials).

ammunition and requiring citizens to disable or lock-up handguns when not physically carrying them constitutional; United States v. Chovan, 735 F.3d 1127 (9th Cir 2013) (federal law life-time ban on possessing firearm for individual convicted of domestic violence constitutional); United States v. Decastro, 682 F.3d 160 (2nd Cir. 2012) (federal statute prohibiting transportation into one’s state of residence firearms acquired out of state, without meeting in-state licensing requirements, valid); United States v. Huet, 665 F.3d 588 (3rd Cir. 2012) (Second Amendment right to own firearms no bar to prosecuting individual for abetting her live-in boyfriend’s unlawful possession of a gun based on his being a convicted felon); NRA of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185 (5th Cir. 2012) (federal law which prohibits federally licensed firearms dealers from selling to anyone under 21 constitutional); Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) (county ordinance barring guns on county property survives a Second Amendment challenge by gun show organizers seeking to set up a booth at a local fairgrounds); Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (mere registration requirement presumptively constitutional, and bans on assault weapons and large-capacity guns constitutional); United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011) (constitutional to ban carrying guns into national parks); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011) (illegal aliens have no Second Amendment right to firearms); United States v. Fincher, 538 F.3d 868 (8th Cir. 2008) (machine gun, like sawed-off shotgun, not covered by Heller because they are “dangerous and unusual weapons”).

See, e.g., Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (ban on all firing ranges within Chicago likely violates the Second Amendment); Wilson v. County of Cook, 968 N.E.2d 641 (Ill. 2012) (county ban on assault weapons raises a triable issue whether it violates the Second Amendment); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012) (2-1 panel held that an Illinois law prohibiting most people from carrying a gun in public violates the Second Amendment, while acknowledging that a narrower law requiring applicants to show “proper cause” to obtain a permit to carry a gun has been held constitutional in Kachalsky v. Westchester County, N.Y., 701 F.3d 81 (2nd Cir. 2012)). A city was held to violate procedural due process for not having procedures in place for return of a handgun following dismissal of charges against the accused. Walters v. Wolf, 660 F.3d 307 (8th Cir. 2011). The attorneys who successfully litigated Heller were awarded $1,132,182 in attorneys’ fees. Heller v. District of Columbia, 832 F. Supp. 2d 32 (D.D.C. 2011).

In addition to these victories, a Protection of Lawful Commerce in Arms Act was passed in 2005, and has been used as a barrier to state tort litigation against the gun industry. For example, in Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009), the Ninth Circuit held that the Act preempts shooting victims’ tort claims under California statutes against federally licensed gun manufacturers and distributors. Agreeing with a number of other recent decisions on the Act, the Ninth Circuit also held that the Act does not violate any constitutional rights the victims may have under the Due Process Clause, Equal Protection Clause, Takings Clause, or general separation of powers concerns.
2. The Third Amendment: Protection Against Quartering of Soldiers In Individuals’ Homes

The Third Amendment provides: “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.” The Supreme Court has never interpreted or applied this Amendment. The Second Circuit has said that the Third Amendment is part of the right of privacy protected by the Due Process Clause of the 14th Amendment. Applying that theory, it ruled that a claim under the Third Amendment was stated by prison officers who were displaced during a strike from rented quarters in the prison by state military and law enforcement officers who operated the prison during the strike. No right of action ultimately arose, however, because the court upheld dismissal of the suit on the ground that the governor and state offices who acted to remove the guards had a “good faith” immunity defense to prosecution under the civil rights acts that formed the basis of the lawsuit. Qualified immunity applied, the Second Circuit concluded, because appellants’ Third Amendment rights were not clearly established at the time of the events in question, consistent with qualified immunity doctrine, discussed at § 10.4.3(A) nn.66-70.

3. The Fourth, Fifth, Sixth, and Eighth Amendments on Criminal Procedural Matters

With respect to criminal procedural matters, the liberal instrumentalist predisposition to protect the unempowered in society, noted at § 1.1.4 text following n.20, has meant that in construing the protections of the Fourth, Fifth, Sixth, and Eighth Amendments, liberal instrumentalist judges have been at the forefront in terms of ensuring vigorous protection for the rights of the accused. In contrast, Holmesian judges, with their deference-to-government predisposition, and formalist judges, based on fixed, static interpretation grounded in literal text and specific historical intent, also noted at § 1.1.4 text following n.20, tend to embrace more limited readings of these constitutional provisions. Natural law judges tend to reach conclusions intermediate between these two extremes. All these rights are typically the subject of a separate constitutional law course entitled “Criminal Procedure,” and thus are not considered in this Coursebook. For further discussion of these amendments in light of the four decisionmaking styles, see Charles D. Kelso & R. Randall Kelso, The Path of Constitutional Law § 23.2 (2007) (http://libguides.stcl.edu/kelsomaterials).

4. The Seventh Amendment: Right to Jury Trial in Actions At Common Law

The Seventh Amendment provides: “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.” By its terms, this Amendment applies only to suits “at common law,” not suits in equity or admiralty or maritime jurisdiction. In interpreting the Seventh Amendment, the Court has adopted a natural law approach, focusing on purpose, history, practice, and precedent, with an evolving meaning, not a formalist, literal, static interpretation. The Court noted in Curtis v. Loether:

Mr. Justice Story established the basic principle in 1830:

“The phrase ‘common law,’ found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law, (the Framers of the Amendment) meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.”

Petitioner nevertheless argues that the Amendment is inapplicable to new causes of action created by congressional enactment. . . . Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. See, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962) (trademark laws); Hepner v. United States, 213 U.S. 103, 115 (1909) (immigration laws); cf. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916) (antitrust laws), and the discussion of Fleitmann in Ross v. Bernhard, 396 U.S. 531, 535-36 (1970). Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.30

For statutory rights that are not the equivalent of a common law action for damages, or for which at common law a jury trial would not be required, such as where the subject matter outruns the competence of the normal jury, as in the construction of a patent, including terms of art within its claim, a jury trial is not required.31 The basic test is whether "the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.'”32 Cases under 42 U.S.C. § 1983, the main statute for bringing cases of constitutional violations against states, are viewed as presumptively triggering Seventh Amendment protection.33 In contrast, the Seventh Amendment does not apply to suits against the United States. As the Court noted in Lehman v. Nakshian, “When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial.”34

By its literal text, the Seventh Amendment only applies to preserve the right of jury trial for issues of “fact.” Thus, even in federal court, questions of law, such as the right to equitable remedies, as for specific performance or an injunction, or some defenses, such as illegality or unconscionability

in contract law, are still decided by the court. Again adopting a natural law style of interpretation, and particularly the natural law focus on following precedent, the Court has noted, “We look to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted. Where history does not provide a clear answer, we look to precedent and functional considerations.”

Like most constitutional rights, the right to a jury trial can be waived by the individual, as long as that waiver is knowing and voluntary, as in contractual provisions providing for mandatory binding arbitration.

While most Bill of Rights provisions have been incorporated into the Due Process Clause of the 14th Amendment, and thus made applicable against the states, the Court has not incorporated the Seventh Amendment, as discussed at § 14.3.2 text following note 77. Although there seems little chance that the Court would rethink this view, principally on the grounds that the current view reflects appropriate deference to state procedural practices, one set of commentators have argued that the Seventh Amendment should be viewed as incorporated into the 14th Amendment, like most of the other Bill of Rights provisions.

Because the Seventh Amendment has not been incorporated into the 14th Amendment, states can permit traditional common-law factual issues to be decided by a state court judge, not a jury, as long as that is consistent with any provisions in their own state constitutions on the right to a jury trial. Such judicial determination would not be permitted if the case were heard in federal court under diversity jurisdiction. For example, in *Byrd v. Blue Ridge Rural Electric Co-op., Inc.*, the Supreme Court held that while the question of whether the claim of an injured workman is within a state Industrial Commission's jurisdiction under a state Worker’s Compensation statute may be a matter for decision by the state court trial judge under state law, because of the Seventh Amendment it was a question for the jury to determine in a case in federal court under diversity jurisdiction.

35  *Id.* at 718-21.


§ 16.4. Individual Rights in Later Amendments, Including the 13th Amendment Ban on Slavery or Involuntary Servitude

1. Overview of Later Amendments: The Eleventh - Twenty-Seventh Amendments

A useful way to group constitutional amendments is to organize them around four historical concerns.\(^{40}\) Between 1789 and 1804, the "Anti-federalist" or "Jeffersonian" amendments were adopted. This includes the first ten amendments, known as the Bill of Rights (1791), addressed at § 16.3; the Eleventh Amendment (1795) preventing federal courts from entertaining some lawsuits against the states, addressed at § 8.2; and the Twelfth Amendment (1804), which harmonized political parties with the electoral college to avoid the problems caused in the 1800 election.

Prior to the 1804 presidential election, electors did not cast separate ballots for President and Vice President. The candidate receiving the most votes was elected President and the runner up, Vice President. To differentiate between the party's choices for each office, one elector was designated to cast an odd vote so that the two candidates would not receive identical totals. The latent difficulty with this practice became evident in 1800 when the Democratic-Republican nominees deadlocked because each state that had voted for that ticket believed it was the duty of another to cast the lone separate vote. As a result, the electoral college voted 73 for Thomas Jefferson, 73 for Aaron Burr, 65 for John Adams, 64 for Thomas Pinckney, and 1 for John Jay. It therefore ended in a deadlock between Jefferson and Burr that sent the decision to the House of Representatives.

At the time, the Congress that would be deliberating the choice for the next President and Vice President was not the incoming Congress, as it has been following the 20th Amendment that seats the new Congress at the beginning of the new year, but the outgoing Congress. In 1801, this meant the outgoing Federalist Congress was to make the decision, not the incoming Jeffersonian Congress. Given this fact, there was a great deal of concern about Federalist mischief-making, including the possibility of not having a President-elect by the time of the inauguration. The latter fears were put to rest when the House agreed on February 9, 1801 that they would go into continuous session until a new President was chosen. On February 17, after much deliberating and with some help from his Federalist rival Alexander Hamilton, Thomas Jefferson was elected, on the 36th ballot, President of the United States. The 12th Amendment was ratified four years later, and included an explicit provision that electors would cast separate ballots for President and Vice President.\(^{41}\)

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\(^{40}\) This grouping is based on Thomas E. Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 Widener J. Pub. L. 1, 11-12 (2000).

A second grouping of constitutional amendments involve the "Civil War Amendments," the Thirteenth, Fourteenth, and Fifteenth Amendments, which were ratified during Reconstruction in the years 1865, 1868, and 1870, respectively. The Thirteenth Amendment and Fourteenth Amendment Citizenship Clause are addressed below. The Fourteenth Amendment Equal Protection Clause is addressed in Chapters 19-23. The Fourteenth and Fifteenth Amendment provisions regarding voting are addressed in Chapter 24. The Fourteenth Amendment Due Process Clause is addressed in Chapters 25-28. Congressional power to enforce the Civil War Amendments is addressed at § 7.4.

A third grouping of amendments involves the populist and progressive movements at the beginning of the 20th century, which produced: the federal income tax in the Sixteenth Amendment (1913), addressed at § 7.1.1; the direct election of Senators in the Seventeenth Amendment (1913); the national Prohibition in the Eighteenth Amendment (1919); and its repeal in the 21st Amendment (1933), addressed at § 14.4.4; and women's suffrage in the Nineteenth Amendment (1920).

The most recent set of ratifications have dealt with federal elections: the Twentieth Amendment (1933) limited the lame duck session of Congress; the Twenty-Second Amendment (1951) set a two-term limit for the office of the President; the Twenty-Third Amendment (1961) awarded three electoral college votes to the District of Columbia; the Twenty-Fourth Amendment (1964) abolished poll taxes in federal elections; the Twenty-Fifth Amendment (1967) revised the rules for presidential succession and devised a new procedure for presidential disability; the Twenty-Sixth Amendment (1971) extended the franchise to 18-year-olds; and the Twenty-Seventh Amendment (1992) requires any pay increase for members of Congress to go into effect only after the next regular election. The 27th Amendment was proposed by the first Congress as part of the Bill of Rights, but laid dormant for more than 200 years before it was revived in an era of budget deficits in the 1980s and ratified by 3/4 of the states in 1992. The modern practice is for Congress to include a time limit, usually 7 years, in proposed amendments. These “federal elections” provisions are reasonably straightforward. No further treatment of them is given in this Coursebook.

2. The Thirteenth Amendment and Fourteenth Amendment Citizenship Clause

Passed in Congress by January 31, 1865, and declared ratified by 3/4 of the states on December 18, 1865, the 13th Amendment provides: “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 protection. Section 2. Congress shall have power to enforce this article by appropriate legislation.” By its text, which provides “[n]either . . . shall exist,” this provision bans public and private conduct that involves slavery or involuntary servitude, and makes this right not subject to waiver. The Fourteenth Amendment Citizenship Clause provides: “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.” While the purpose of this provision was to make sure newly-freed slaves would be treated as citizens, its literal text extends citizenship to anyone born in the United States, even of non-citizen parents. United States v. Wong Kim Ark, 169 U.S. 649 (1898) (6-2 decision, one Justice not participating). See also Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (14th Amendment Citizenship Clause does not apply to persons born in American Samoa; their status determined by section 308(1) of the
Immigration and Nationality Act of 1952 which designates persons born in American Samoa as non-citizen nationals), cert. denied, 136 S. Ct. 2461 (2016); Maslenjak v. United States, 137 S. Ct. 1918 (2017) (citizenship cannot be revoked for lying on naturalization form unless lie is material).

The ratification of the Civil War Amendments is relatively unique. As one author has noted:

When it proposed the Thirteenth Amendment on January 31, 1865, and the Fourteenth Amendment on June 13, 1866, Congress lacked the full representation of the eleven southern states. . . . Secretary of State William H. Seward certified on December 18, 1865, that twenty-seven out of thirty-six states had ratified the Thirteenth Amendment and that it was therefore valid. According to this count, no state had ever left the Union of thirty-six, yet among the twenty-seven ratifying states were the loyalist legislatures of Virginia, Louisiana, Tennessee, and Arkansas. Alabama (which ratified on December 2), North Carolina (December 4), and Georgia (December 6) acted following indications that the President viewed ratification as necessary to restore their full participation in the Union.

Ratification of the Fourteenth Amendment came about through plain coercion. The March 2, 1867 Military Reconstruction Act required ten of the former confederate states, as conditions to readmission to the Union, to form new republican governments with suffrage extended without regard to race, and to ratify the Fourteenth Amendment. [Ed.: Tennessee had already ratified. Ratification of the later 15th Amendment’s ban on race discrimination in voting was aided by this Act also.] By July 1870, all of the former confederate states had been readmitted.42

Despite these irregularities, it can be argued that the drafting and ratification of the Civil War Amendments met the technical procedural requirements of the Article V amendment process.43 In any event, the Court has routinely viewed questions of the proper ratification of constitutional amendments as political questions, as noted at § 4.3.1(B)-(C), and the validity of the Civil War Amendments is also confirmed as a matter of “settled law.” “Settled law” is defined at § 2.4.6 n.79.

The background to the 13th Amendment was the practice of slavery in the South before the Civil War, and the practice in the North during the colonial period of indentured servitude. It has been


43 See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375 (2001). Based on ratifications by July 9, 1868, Congress declared the 14th Amendment ratified by 3/4 of the states on July 21. That count included Ohio and New Jersey, which had rescinded their ratifications, but Congress chose to count their earlier action. Two additional states, Alabama and Georgia, ratified on July 13 and July 21, respectively, making counting Ohio and New Jersey unnecessary. See id. at 578 n.11. But see Thomas B. Colby, Originalism and the Ratification of the Fourteenth Amendment, 107 NW. U.L. Rev. 1627, 1655-56 & n.168 (2013) (still “relevant” to concerns with “formal legitimacy”). Certainly it can be argued that voting is different depending on whether the Amendment has already been ratified or your state is the critical state for ratification.
noted, “Throughout most of the colonial period, opposition to slavery among white Americans was virtually nonexistent. Settlers in the 17th and 18th centuries came from sharply stratified societies in which the wealthy savagely exploited members of the lower classes. Lacking a later generation’s belief in natural human equality, they saw little reason to question the enslavement of Africans.”

During the period surrounding the Civil War, Jefferson Davis, President of the Confederate States of America, stated, “[Slavery] is sanctioned in the Bible, in both Testaments, from Genesis to Revelation. . . . It has existed in all ages, has been found among the people of the highest civilization, and in nations of the highest proficiencies in the arts.” More generally:

The religious defense of slavery was rooted in the Bible, and apologists found numerous references there to justify slavery. Mosaic law was said to authorize the buying, selling, holding, and bequeathing of slaves as property. Abraham and other prophets held slaves, and the New Testament failed to condemn slavery. The Apostles were said to have received slaveholders into the church. But the most important Biblical reference Southerners pointed towards was Genesis 9:25, Noah's curse on Ham, father of Canaan, for Ham's indiscretion towards Noah, which clerics read as specifically authorizing African-American slavery.

In the Bible's words, Noah became drunk and lay "uncovered inside his tent." Ham "saw his father's nakedness and told his two brothers outside." But the brothers, Shem and Japheth, walked into the tent backwards and covered their father with a garment without ever looking at him. When Noah awoke and discovered what his youngest son had done, he said: "Cursed be Canaan! The lowest of slaves will he be to his brothers. . . . Blessed be the LORD, the God of Shem! May Canaan be the slave of Shem . . . . May God extend the territory of Japheth; may Japheth live in the tents of Shem, and may Canaan be his slave."

A Georgian in 1844 summarized the masters' interpretation of this passage thus: "From Ham were descended the nations that occupied the land of Canaan, and those that now constitute the African or Negro race." . . . South Carolinian Iveson L. Brookes explained that Ham deserved "decapitation" for his crime, but a merciful God chose to punish him "by flattening his head, kinking his hair, and blackening his skin, thereby making him black and subject to slavery."45

Of course, this analysis is inconsistent with the basic biblical imperative that all individuals are created by God, and thus entitled to equal natural rights, and with Jesus’ and St. Paul’s general statements concerning love, the equality of all persons, and the “Golden Rule” (treating one’s fellow humans as one expects to be treated by others). It is also inconsistent with the modern ban on slavery in the 1948 United Nations Universal Declaration of Human Rights.46

44 The Bible, Christianity, and Slavery 3-4 (www.religioustolerance.org/chr_salv1.htm) (access using search engine and key phrases in quote).


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As part of the compromise to get approval from all state delegations at the Constitutional Convention in 1787, a number of constitutional provisions acknowledged slavery. The Three-Fifths Clause states in Article I, § 2, cl. 3, “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons [meaning slaves].” Under Article I, § 9, cl. 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.” Congress did ban the slave trade after 1808 in an 1807 Act. Following 1808, births by existing slaves in the United States rendered substantially unnecessary any further importation of slaves. Indeed, many Southerners actively supported the ban, which was occasionally breached by smugglers, in order prudentially to limit supply and keep slave prices high. Article IV, § 2, cl. 3, the Fugitive Slave Clause, is discussed at § 14.1.2(F).

Against this backdrop, in 1857 in *Dred Scott v. Sandford*, the Supreme Court intimated that slaves could be brought into the North and yet remain the property of the owner, with Chief Justice Roger Taney writing that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.” Taney's views reflected the opinions of many Southerners.

Of course, the opinions of Washington, Jefferson, and Madison were more ambivalent with respect to slavery, viewing it as against natural law, but promoting a gradual program of abolition in the Southern states, usually with compensation, and often coupled, as was also Lincoln’s initial position, with a utopian view of return of freed blacks to Africa. With regard to views in America generally, it has been noted, “In the sixty-two years between Washington's election and the Compromise of 1850, . . . slaveholders controlled the presidency for fifty years, the Speaker's chair for forty-one years, and the chairmanship of House Ways and Means for forty-two years. The only men to be reelected president – Washington, Jefferson, Madison, Monroe, and Jackson – were all slaveholders. The men who sat in the Speaker's chair the longest – Henry Clay, Andrew Stevenson, and Nathaniel Macon – were slaveholders. Eighteen out of thirty-one Supreme Court justices were slaveholders.”

This dominance was partly the product of the Three-Fifths Clause of Article I, § 2, cl. 3, noted above. This provision enabled the South to obtain greater representation in the House than if representation had been based on the number of free individuals alone. That also had a direct effect

47 60 U.S. (19 How.) 393, 450 (1857).

48 *See generally* ROGER WILKINS, JEFFERSON'S PILLOW (2001) (discussing the founding fathers' ownership of slaves, while they promoted United States as a land of freedom).

on presidential elections, as Article II, § 1, cl. 2 provides that each state’s presidential electors are equal to “the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” For example, if slaves had not been counted as three-fifths of a person, thus increasing the electoral college votes of the Southern states, John Adams would have won the electoral college vote in 1800, not Thomas Jefferson.

**Dred Scott v. Sandford**

*60 U.S. 393 (1857)*

Chief Justice TANNEY delivered the opinion of the court.

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.
The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.
The legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

The language of the Declaration of Independence is equally conclusive. . . . It then proceeds to say: ‘We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.”

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men – high in literary acquirements – high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and
laws long before established, and were never thought of or spoken of except as property, and when
the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is
equally evident from its provisions and language.

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts
stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the
Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that
the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is
erroneous. . . . The suit ought, in this view of it, to have been dismissed by the Circuit Court, and
its judgment in favor of Sandford [that Dred Scott is still a slave] is erroneous [because it had no
jurisdiction], and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very
little, if any, difference in a pecuniary or personal point of view to either party. But the fact that the
result would be very nearly the same to the parties in either form of judgment, would not justify this
court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned,
might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his
freedom.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitute,
extcept as a punishment for crime, shall be forever prohibited in all that part of the territory ceded
by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north
latitude, and not included within the limits of Missouri. And the difficulty which meets us at the
threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any
of the powers granted to it by the Constitution; for if the authority is not given by that instrument,
it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom
upon any one who is held as a slave under the have of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers
on Congress the power “to dispose of and make all needful rules and regulations respecting the
territory or other property belonging to the United States;” but, in the judgment of the court, that
provision has no bearing on the present controversy, and the power there given, whatever it may be,
is confined, and was intended to be confined, to the territory which at that time belonged to, or was
claimed by, the United States, and was within their boundaries as settled by the treaty with Great
Britain, and can have no influence upon a territory afterwards acquired from a foreign Government.
It was a special provision for a known and particular territory, and to meet a present emergency, and
nothing more.

[T]he rights of property are united with the rights of person, and placed on the same ground by the
fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty,
and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property . . . .

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words – too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

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Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham*, reported in [51 U.S. (10 How.) 82 (1850)]. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, therefore, cannot be governed by the case of *Strader et al. v. Graham*, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen.

Justice McLEAN dissenting.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is “a freeman.” Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.

The pleader has not the boldness to allege that the plaintiff is a slave, as that would assume against him the matter in controversy, and embrace the entire merits of the case in a plea to the jurisdiction. But beyond the facts set out in the plea, the court, to sustain it, must assume the plaintiff to be a slave, which is decisive on the merits. This is a short and an effectual mode of deciding the cause; but I am yet to learn that it is sanctioned by any known rule of pleading.

There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did now allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane; by the King's Bench, they were held to be free. (2 Barn. and Cres., 440.)
In the great and leading case of *Prigg v. The State of Pennsylvania*, ([41 U.S. (16 Peters) 539, 611-12 (1842)]) this court said that, “[b]y the general law of nations, no nation is bound to recognize the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Somersett's case*, (Lafft's Rep., 1; 20 Howell's State Trials, 79,) which was decided before the American Revolution.”

The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the act admitting that State into the Union, was passed by a vote of 134, in the House of Representatives, to 42. Before Mr. Monroe signed the act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular, if in 1804 Congress had power to prohibit the introduction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power, embodied in the Missouri compromise, could not be exercised in 1820.

But this law of Congress, which prohibits slavery north of Missouri and of thirty-six degrees thirty minutes, is declared to have been null and void by my brethren. And this opinion is founded mainly, as I understand, on the distinction drawn between the [Northwest O]rdinance of 1787 and the Missouri compromise line. In what does the distinction consist? The ordinance, it is said, was a compact entered into by the confederated States before the adoption of the Constitution; and that in the cession of territory authority was given to establish a Territorial Government.

It is clear that the ordinance did not go into operation by virtue of the authority of the Confederation, but by reason of its modification and adoption by Congress under the Constitution. It seems to be supposed, in the opinion of the court, that the articles of cession placed it on a different footing from territories subsequently acquired. I am unable to perceive the force of this distinction. That the ordinance was intended for the government of the Northwestern Territory, and was limited to such Territory, is admitted. It was extended to Southern Territories, with modifications, by acts of Congress, and to some Northern Territories. But the ordinance was made valid by the act of Congress, and without such act could have been of no force.

If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which, it followed the ordinance of 1787.

In the first and second sections of the sixth article of the Constitution of Illinois, it is declared that neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than for the punishment of crimes whereof the party shall have been duly convicted; and in the second section it is declared that any violation of this article shall effect the emancipation of such person from his obligation to service. In Illinois, a right of transit through the State is given the master with his slaves. This is a matter which, as I suppose, belongs exclusively to the State.
The Supreme Court of Illinois, in the case of Jarrot v. Jarrot, (2 Gilmer, 7,) said: “After the conquest of this Territory by Virginia, she ceded it to the United States, and stipulated that the titles and possessions, rights and liberties, of the French settlers, should be guarantied to them. This, it has been contended, secured them in the possession of those negroes as slaves which they held before that time, and that neither Congress nor the Convention had power to deprive them of it; or, in other words, that the ordinance and Constitution should not be so interpreted and understood as applying to such slaves, when it is therein declared that there shall be neither slavery nor involuntary servitude in the Northwest Territory, nor in the State of Illinois, otherwise than in the punishment of crimes. But it was held that those rights could not be thus protected, but must yield to the [Northwest O]rdinance and Constitution.”

The first slave case decided by the Supreme Court of Missouri, contained in the reports, was Winny v. Whitesides, (1 Missouri Rep., 473,) at October term, 1824. It appeared that, more than twenty-five years before, the defendant, with her husband, had removed from Carolina to Illinois, and brought with them the plaintiff; that they continued to reside in Illinois three or four years, retaining the plaintiff as a slave; after which, they removed to Missouri, taking her with them. . . . The court held, that if a slave be detained in Illinois until he be entitled to freedom, the right of the owner does not revive when he finds the negro in a slave State. That when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom.

In the case of Lagrange v. Chouteau, (2 Missouri Rep., 20, at May term, 1828,) it was decided that the ordinance of 1787 was intended as a fundamental law for those who may choose to live under it, rather than as a penal statute. That any sort of residence contrived or permitted by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance, and thereby introduce slavery de facto, would entitle such slave to freedom.

In Julia v. McKinney, (3 Missouri Rep., 279,) it was held, where a slave was settled in the State of Illinois, but with an intention on the part of the owner to be removed at some future day, that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, the slave is entitled to her freedom, under the second section of the sixth article of the Constitution of Illinois.

This court follows the established construction of the statutes of a State by its Supreme Court. Such a construction is considered as a part of the statute, and we follow it to avoid two rules of property in the same State. But we do not follow the decisions of the Supreme Court of a State beyond a statutory construction as a rule of decision for this court. State decisions are always viewed with respect and treated as authority; but we follow the settled construction of the statutes, not because it is of binding authority, but in pursuance of a rule of judicial policy.

But there is no pretense that the case of Dred Scott v. Emerson turned upon the construction of a Missouri statute; nor was there any established rule of property which could have rightfully influenced the decision. On the contrary, the decision overruled the settled law for near thirty years.

This is said by my brethren to be a Missouri question; but there is nothing which gives it this character, except that it involves the right to persons claimed as slaves who reside in Missouri, and
the decision was made by the Supreme Court of that State. It involves a right claimed under an act of Congress and the Constitution of Illinois, and which cannot be decided without the consideration and construction of those laws. But the Supreme Court of Missouri held, in this case, that it will not regard either of those laws, without which there was no case before it; and Dred Scott, having been a slave, remains a slave. In this respect it is admitted this is a Missouri question – a case which has but one side, if the act of Congress and the Constitution of Illinois are not recognized.

And does such a case constitute a rule of decision for this court – a case to be followed by this court? The course of decision so long and so uniformly maintained established a comity or law between Missouri and the free States and Territories where slavery was prohibited, which must be somewhat regarded in this case. Rights sanctioned for twenty-eight years ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free States.

Justice CURTIS dissenting.

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere; and that no technical domicil at the place of the contract is necessary to make it so. (See Bishop on Mar. and Div., 125-129, where the cases are collected.)

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights; of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer husband and wife; and a child of that lawful marriage, though born under the same
dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim, *partus sequitur ventrem*.

In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the *status* of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of that contract of marriage, destroy his rights as a husband, bastardize the issue of the marriage, and reduce them to a state of slavery?

These questions, which arise exclusively under the Constitution and laws of the United States, this court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the *status* of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State courts, however great respect might be felt for their learning, ability, and impartiality. (See Swift v. Tyson, 16 Peters's R., 1; Carpenter v. The Providence Ins. Co., Ib., 495; Foxcroft v. Mallet, 4 How., 353; Rowan v. Runnels, 5 How., 134.) Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as “persons held to service in one State, under the laws thereof.” Nothing can more clearly describe a *status* created by municipal law. In *Prigg v. Pennsylvania*, ([41 U.S. (10 Pet.) 539, 611 (1842)]) this court said: “The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws.”

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein?

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional.
Based upon the slavery provisions in the Constitution, the Supreme Court reached three major conclusions in 1857 in *Dred Scott v. Sandford*, each consistent with Southern pro-slavery attitudes: (1) the core holding of the case that Dred Scott could not sue in federal courts under diversity jurisdiction applicable to diverse citizens from different states, because Missouri did not consider him a citizen of Missouri, and the related conclusion that any African-American descendant of a slave, even if living in a free state and even if born free, could not be viewed as a citizen of the United States and have access to United States courts anywhere (which would include virtually all African-Americans in the United States at the time); (2) in any event, Dred Scott had not attained his freedom from residence on free soil, and maintained that freedom upon his return to Missouri; and (3) the Missouri Compromise of 1820, which had limited slavery predominantly to Southern states, was an unconstitutional infringement upon the property rights of slave holders under the Due Process Clause of the Fifth Amendment. The 7-2 majority in *Dred Scott* was composed of Chief Justice Taney, and Justices Campbell, Catron, Daniel, and Wayne, each from slaveholding states, and Justices Grier and Nelson, two Democrats from Northern states. Only Justice Curtis, a Whig from Massachusetts, and McLean, a Democrat from Ohio, dissented.

With regard to Dred Scott’s stay in the free state of Illinois and the territory of Wisconsin (today a part of Minnesota), most state and federal court doctrine from the Constitution through the early 1830s held that as long as the move was a change of residence and not just mere transit through, it gave the slave freedom. Dred Scott’s case involved residence in Illinois and the territory of Wisconsin for a number of years. It has been noted: “It is significant that most of these decisions were made by Southern state courts, or by the federal courts in the Southern states, for the sentiment before 1831 is directly at variance with *Dred Scott* in 1857 . . . . However, [the Court’s] position was not a mere aberration, but instead, reflected the progression of Supreme Court rulings which occurred in the intervening years and represented the developments in the several states.”

With regard to the Missouri Compromise, nothing in the original Constitution, with its carefully crafted set of compromises to permit the institution of slavery to exist in the South, supported the Court’s view in *Dred Scott* that the 5th Amendment Due Process Clause was intended to give slave owners the right to move into United States Territories (or perhaps extended later to Northern states) and continue the practice of slavery. No Court opinion prior to 1857, and legislative and executive practice regarding slavery, in Acts like the Missouri Compromise of 1820, the Compromise of 1850, and the Kansas-Nebraska Act of 1854, all supported the view that the Constitution did not resolve the issue of where slavery must exist as a matter of constitutional requirement.

The precise history of Dred Scott’s life, including his marriage to Harriet Robinson, when he was around 38 years old and she around 17, is a complex and fascinating tale. Dred Scott was born a

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slave in Virginia, around 1800. In 1818, Scott's master, Peter Blow, moved from Virginia to Alabama, and then in 1830 to St. Louis, Missouri. Blow died in 1832, and by the fall of 1833, Dr. John Emerson, a surgeon in the United States Army, had purchased Scott. From December 1, 1833 until May 4, 1836, Emerson served as a physician at Fort Armstrong, which was located in Illinois near the present-day city of Rock Island. Throughout this period Scott also lived at the Fort. Illinois was a free state, and Scott might have claimed his freedom there. The two and a half years that Dred Scott spent in Illinois was sufficient to emancipate him. In 1836, the army evacuated Fort Armstrong, and Dr. Emerson, with Scott, relocated to Fort Snelling, in what is today Minnesota (then part of Wisconsin Territory). Dred Scott remained at Fort Snelling from May 1836 until April 1838. During this period he met and married Harriet Robinson, a slave owned by Major Lawrence Taliaferro, the Indian Agent stationed near Fort Snelling.\(^\text{52}\) She eventually bore Dred Scott two sons, who died in infancy, as well as two daughters – Eliza and Lizzie – who became parties in the lawsuit. Taliaferro was also a justice of the peace, and he performed a formal wedding ceremony. Under the laws of Southern states, slaves could never be legally married, as that would undermine in various ways the property interests of the master. However, the Scotts were living in a free jurisdiction and with the consent of their owners were married in a civil ceremony. That could have been used as proof that they were free. The analysis would have been: only free people were entitled to a civil marriage; Dred Scott and Harriet Robinson had a civil marriage; thus, they had to be free.

In November 1837, Dr. Emerson received new orders. The Army next sent him to Fort Jesup in Louisiana. There Dr. Emerson met and married Eliza Irene Sanford. Their wedding ceremony took place on February 6, 1838. Emerson now wanted his slaves, and in April they joined him in Louisiana. When the Scotts arrived, they might have sued for their freedom in that state. Louisiana courts had upheld the freedom of slaves who had lived in free jurisdictions. Or they could not have traveled south and sued for freedom in Fort Snelling. They were living in a free territory, and probably could have found help if they had sued for their freedom or simply tried to escape from slavery. Given their subsequent attempts to become free after Emerson's death, it may be that the Scotts found their bondage to him to be relatively mild and their lives reasonably happy. Dr. Emerson may also have told them that eventually he would free them, and the Scotts may have not only believed him, but also thought that gaining any easy legal manumission was worth the wait.

In December 1843, the forty-year old Emerson died suddenly. His widow, Irene, inherited his estate. For the next three years, the Scotts worked as hired slaves with the rent going to Irene Emerson. During part of this time an army captain rented Dred Scott and took him to the new state of Texas. Scott returned to St. Louis in early February 1846 and tried to purchase freedom for himself and his family. Irene Emerson refused his offer, and in April 1846, Scott filed suit for his freedom and that of his wife and two children. Although the jury in the district court found in favor of Dred Scott and his freedom, based upon his residency in free states, legal maneuvers kept the case in the state courts, and then the federal courts, for the next decade, with the United States Supreme

\(^{52}\) For detailed discussion of the role Harriet Robinson played in the case, and viewing the case through the lens not just of slave owner and slave, but impact on family life, see Lea Vandervelde & Sandhya Subramanian, \textit{Mrs. Dred Scott}, 106 Yale L.J. 1033 (1997).
Court’s decision 11 years later in 1857. By that time, Irene Emerson had remarried, to an anti-slavery Republican from Massachusetts, Calvin Chaffee, but Irene’s brother, John F.A. Sanford, had taken charge of the litigation in her name. As had Irene, John F.A. Sanford spelled his name with only one “d.” However, the Supreme Court reporter mistakenly thought his name was “Sandford.” Hence, the case is called Dred Scott v. Sandford. Following the case, the Chaffees deeded the Scott family to Taylor Blow, one of Peter Blow’s children, and he freed them on May 26, 1857. Dred Scott died in September 1858 of tuberculosis; Harriet Scott lived until June 17, 1876.

The Dred Scott ruling significantly affected Northern public opinion and led to fiercer opposition to the expansion of slavery. This decision became a rallying cry for abolitionists and critical both in Abraham Lincoln's run for the presidency in 1860, and in his historic "House Divided" speech during the Lincoln-Douglas debates in the 1858 Illinois Senate race. In that speech, Lincoln stated, “A house divided against itself cannot stand. I believe this government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved – I do not expect the house to fall – but I do expect it will cease to be divided. It will become all one thing, or all the other. Either the opponents of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the States, old as well as new – North as well as South.”

The 1860 Republican platform asserted that freedom was the normal state of United States' territory. This was an advance from the Republican Party's 1856 platform that "all men are endowed with inalienable right[s]," but which only committed the Party to preventing the spread of slavery into the Western territories. Once the Civil War commenced, the Republican-controlled Congress took action against slavery. On March 13, 1862, Congress forbade all Union army officers from returning fugitive slaves, thus effectively annulling the Fugitive Slave Law of 1850, discussed at § 14.1.2(F) n.25. On April 10, 1862, Congress declared that the federal government would compensate slave owners who freed their slaves. All slaves in the District of Columbia were freed in this way on April 16, 1862. On June 19, 1862, Congress prohibited slavery in United States territories.

Leading up to the Emancipation Proclamation, issued on September 22, 1862, with January 1, 1863 as its effective date, Lincoln told his cabinet, “As you know, I have said, more than once, if I could preserve the Union by freeing all of the slaves everywhere, I would do so. If I could preserve the Union by freeing none of the slaves, I would do so. If I could preserve the Union by freeing some of the slaves but not others, I would do so. Well, I have not the political power to do the first. I have not the inclination nor the need to do the second. So I shall now do the third, as a military necessity.” The major military impact of the Proclamation was to limit aid from England or France

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to the South, as those governments did not want to be seen intervening on behalf of the South, despite their desire for Southern cotton, once the North made slavery a central issue in the war.

The Emancipation Proclamation freed slaves only in the Southern states that had seceded from the Union, not in the border states which remained in the Union, or states, or parts of states, which had seceded but were under Union control by January 1, 1863. Thus, omitted from the Proclamation were Maryland and Delaware (which had never seceded), Missouri and Kentucky (with fractional governments that had been accepted to the Confederacy, but had not officially seceded), Tennessee (already under Union control), and specific exemptions for the 48 counties designated to become the state of West Virginia, along with several other named counties of Virginia, and also New Orleans and several named parishes in Louisiana already under Union control.

With the end of the Civil War, the more radical form of complete abolitionism, rejecting the “White Supremacy” premise lying behind Dred Scott, came to dominate Congress. It has been noted:


> Senator Charles Sumner's arguments during the debates on the Kansas-Nebraska Bill were representative of the ideas he also espoused during the Senate debates on the Thirteenth Amendment. "Slavery," he stated in one speech, "is an infraction of the immutable law of nature, and, as such, cannot be considered a natural incident to any sovereignty, especially in a country which has solemnly declared, in its Declaration of Independence, the inalienable right of all men to life, liberty, and the pursuit of happiness."55

The Court’s conclusion in Dred Scott that no descendant of a slave could be a citizen of the United States was reversed by the Citizenship Clause of § 1 of the Fourteenth Amendment, cited at the beginning of this section. The 14th Amendment also banned in § 3 former members of federal or state governments who “shall have engaged in insurrection or rebellion against the [United States], or given aid or comfort to the enemies, thereof,” from holding federal or state office, unless such disability be removed by Congress “by a vote of two-thirds of each House.” This more radical form of abolitionism was also reflected in § 4 of the 14th Amendment, which provided that “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.”56

55 See Alexander Tsesis, Furthering American Freedom: Civil Rights & The Thirteenth Amendment, 45 B.C. L. Rev. 307, 324 (2004). Despite this anti-slavery majority, approving the 13th Amendment in the House on January 31, 1865 barely achieved the 2/3 majority in a 119-56 vote.

56 On these provisions, see Richard L. Aynes, Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation, 39 Akron L. Rev. 289, 315-22 (2006).
PART VI: PROTECTION OF ECONOMIC RIGHTS

CHAPTER 17: THE DUE PROCESS CLAUSE AND ECONOMIC RIGHTS

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§ 17.1 Economic Rights Protection Under the Due Process Clause

1. The Original Natural Law Era: 1789-1873

The basic approach of the Supreme Court to judicial review of legislation during the original natural law era was set forth in *McCulloch v. Maryland*, excerpted at § 5.3. As noted at § 5.2 n.33, *McCulloch* gives Congress great latitude to determine appropriate legislative means, concluding, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

Further, at this time the Due Process Clause predominantly was understood to encompass only procedure: the settled usages and modes of proceeding existing in the common and statute law of England, not shown unsuited to conditions in this country, as the Court held in *Murray's Lessee v. Hoboken Land and Improvement Co.*

2. The Formalist Era and Liberty of Contract: 1873-1937

As discussed at § 14.3.1(B) nn.52-55, in the *Slaughter-House Cases*, while the Supreme Court held in 1873 that Louisiana's state-granted economic monopoly did not violate the Due Process Clause,

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1 17 U.S. 316, 421 (1819).

2 59 U.S. (18 How.) 272 (1856). A broader interpretation of "due process" was reflected in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), excerpted at § 16.4.2, where the Court said that depriving a citizen of property, a slave, merely because the citizen brought the slave into United States territory, was not due process. Other seeds for "substantive due process" were planted in a few state court decisions against impairing "vested rights." For example, in *Wynehamer v. The People*, 13 N.Y. 378, 393-395 (1856), the New York Court of Appeals held that an act to prevent intemperance substantially destroyed the property interest in intoxicating liquors by persons within the state when applied to liquors possessed when the act was passed. Had the act been applicable only to liquors imported or manufactured after it took effect, it would have been constitutional.
probably because due process was thought to relate only to procedure, four dissenters would have held the required monopoly violated “privileges or immunities” rights of individuals to contract with whomever they please. Three years later, in 1876, a majority of the Court held in *Munn v. Illinois* that under some circumstances a regulation of business could be found to violate due process, reflecting the dissent’s concerns in the *Slaughter-House Cases*, but abandoning “privileges or immunities” analysis. Chief Justice Waite began in *Munn* by declaring that “it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all.” He then invoked a maxim he identified with a treatise written by Lord Chief Justice Hale in England “more than two hundred years ago” that when property became "affected with a public interest" it ceased to be private and could be "controlled by the public for the common good." This maxim, he argued, had become part of the common law and was embodied in the principle that private property "became clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."

Reflecting a moderate formalist approach, which was dominant for much of the formalist era, as noted with respect to the Commerce Clause at § 6.1 nn.7-10, the Court in *Munn* had a relatively generous list of businesses "affected with a public interest" doctrine. Chief Justice Waite listed examples of such private property, including ferries, wharves, warehouses, inns, turnpikes, bridges, mills, and common carriers. In *Munn*, Chief Justice Waite found that the Chicago grain elevators at issue in the case were clothed with a public interest because: (1) the grain elevators were significant to the shipment of grain from the midwestern states that produced it to markets around the Nation; (2) nearly all the nation's midwestern grain passed through the port and railroad hub of Chicago and was stored in elevator warehouses while awaiting shipment; and (3) the Chicago grain elevator franchises charged uniform, comparatively high storage rates.

Two years later, in 1878, the *Munn* view began to take hold that the Due Process Clause included some substantive limitation on government action regulating economic transactions. In *Davidson v. New Orleans*, the Court held that if a statute purported to vest the title of A's land in B, that would be a deprivation of A's property without due process of law. Additional dictum appeared in 1887 in *Mugler v. Kansas*, where the Court said that a law which has “no real or substantial relation” to its objects would violate the Constitution. In 1890, the Court reviewed administratively set railroad rates. This gave rise to the substantive standard in 1898 that such rates had to be

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3 94 U.S. 113, 125-26 (1876).

4  *Id.* at 126-33.

5 96 U.S. 97, 101-03 (1878).

6 123 U.S. 623, 661 (1887).

7  Chicago M. & St. P.R. Co. v. Minnesota, 134 U.S. 418, 456-58 (1890).
reasonable in light of the fair value of the property in use. 8 A year earlier, in 1897, the Court had struck down its first statute on liberty of contract grounds in Allgeyer v. Louisiana, 9 which held that a state could not make it illegal for a New York insurance company to use the mails to contract with Louisiana residents, even where the state’s ban only applied to companies refusing to have sufficient presence in the state to permit residents to sue in Louisiana courts in the event of breach of contract.

Substantive due process review of economic regulations came to full flower in 1905 in Lochner v. New York, 10 excerpted at § 17.2. There a 5-4 Court held that the right to make a contract is part of a "liberty of contract" protected by the 14th Amendment, reflecting the result advocated by the four Justices who dissented in the Slaughter-House Cases. This “liberty of contract” could be interfered with only by laws which reasonably relate to the health and safety, morals, or general welfare in regulating a business affected with the public interest. In Lochner, the majority concluded that the health concerns of workers in the baker’s industry was not a strong enough reason to limit bakers to 10 hours of work a day. Further, under the Lochner approach, a business affected with the public interest had to be one in which “the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly.” 11 In such cases, there is no competitive free market to discipline business behavior, and thus government regulation was justified. In contrast, for the more moderate Justices on the Court, reflecting earlier cases like Munn, the phrase “affected with the public interest” meant “no more than that an industry, for adequate reason, is subject to control for the public good.” 12

In 1908, the Court struck down both state and federal legislation regulating or banning employers from using yellow dog contracts (i.e., employee agreements not to join a union). Thus, business were permitted to use such anti-labor union contract provisions. 13 On the other hand, where the government interests were perceived as being strong enough, as for health concerns with miners and black lung disease; 14 or laws requiring vaccinations; 15 or health concerns with women working more

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9 165 U.S. 578, 583-93 (1897).
10 198 U.S. 45, 52-60 (1905).
12 Id. at 536. For discussion of Lochner generally, see Jeffrey M. Shaman, On the 100th Anniversary of Lochner v. New York, 72 Tenn. L. Rev. 455 (2005), and sources cited therein.
14 Holden v. Hardy, 169 U.S. 366, 391-96 (1898) (no more than 8 hours underground per day).
than 10 hours a day in a factory, as in Muller v. Oregon, excerpted at § 17.2, legislation was upheld. The practical impact of the statute in Muller was to favor men for employment, since many manufacturing plants at the time ran on two 12-hour shifts, and if women, but not men, could only work 10 hours a day, they were not as attractive employees for businesses. Because of shifts in employment caused, in part, by male labor shortages during World War I, by the early 1920s most businesses had moved to three 8-hour shifts, rendering 10-hour-a-day statutes of little import.

In 1917, the Court upheld “four very controversial labor reforms: workers’ compensation laws, a federal law that not only limited railroad workers to an eight-hour day but also fixed wages at the level the workers had received when working longer hours, a minimum wage law for women, and a maximum hours law for all industrial workers. The latter ruling seemed to directly contradict Lochner and therefore overruled its specific holding sub silentio.” After 1922, however, four extreme formalists were on the Court, with the appointments of Justices Sutherland and Butler in 1922, who joined Justices Van Devanter and McReynolds. From 1922-37, the four extreme formalists needed only one other vote in any case to prevail. These votes could be obtained from moderate formalists like Justice McKenna from 1922-25, or Chief Justice Taft from 1922-30, or Justice Sanford from 1923-30, or Chief Justice Hughes or Justice Roberts from 1930-37. Thus, the Lochner doctrine began to be applied more vigorously. A number of reformist laws were struck down, including a minimum wage law for women and children in Adkins v. Children’s Hospital, banning use of certain materials in production, regulating the prices of theater tickets, and regulating the entry into a business.

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16 208 U.S. 412, 418-23 (1908).

17 David E. Bernstein, The Story of Lochner v. New York, in CONSTITUTIONAL LAW STORIES 350 (Michael C. Dorf ed., 2004), citing, inter alia, Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (workers’ compensation law); Wilson v. New, 243 U.S. 332 (1917) (railroad workers law); Simpson v. O’Hara, 243 U.S. 629 (1917) (4-4 decision upholding a minimum wage law for women; Justice Brandeis recused himself because he had worked on the case before being appointed to the Court); Bunting v. Oregon, 243 U.S. 426 (1917) (maximum hours law); Adkins v. Children’s Hospital, 261 U.S. 525, 564 (1923) (Taft, C.J., joined by Sanford, J., dissenting) (“It is impossible for me to reconcile the Bunting Case and the Lochner Case, and I have always supposed that the Lochner Case was thus overruled sub silentio.”).

18 Adkins v. Children’s Hospital, 261 U.S. 525 (1923) (minimum wage law for women and children); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (invalid to bar the use of “shoddy” in the manufacture of comfortables where “shoddy” could be made harmless by disinfection or sterilization and there was no evidence of disease having resulted from its use); Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927) (invalid to regulate the prices of theater tickets because that power exists only with business that has become affected with a public interest); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (invalid to require a certificate of public convenience and necessity of persons who desired to engage in the ice business). See generally Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court, 78 B.U.L. Rev. 1489 (1998).
Most of these decisions adopted a pro-employer or pro-management perspective to the questions of health and safety, morals, or general welfare of the public, and applied rules that did not reflect a sensitive balancing regarding the rights of workers versus the rights of business. Naturally, in virtually all of these cases Holmesian Justices Holmes and Brandeis dissented, as did moderate instrumentalists Justice Stone, who joined the Court in 1925, and Justice Cardozo, who replaced Justice Holmes in 1932.

The standard account of *Lochner* is that *Lochner* was just another example of the flaws of an anti-pragmatic, formalist style of decisionmaking driven by conservative pro-business Justices appointed to the Court during this period, as discussed with respect to the Commerce Clause at § 6.1 n.1.\(^\text{19}\) A more complete understanding of *Lochner* may be that *Lochner* “had clear natural law overtones”; that it was motivated in part by “the prestige surviving from the natural law roots of the antislavery movement, which in turn informed the ideology of free labor”; and that it represented a “blurring of evolutionary custom and reason” and “blurring common law and natural law.”\(^\text{20}\)

A more sensitive natural law style of interpretation might have better ensured that true liberty of contract was being advanced, reflecting a more sophisticated approach towards the strengths and weaknesses of the economic natural law theory of *laissez-faire*. Such an approach would reject the oversimplified version of *laissez-faire* represented in Mr. Herbert Spencer’s *Social Statics* (basically Social Darwinism promoting survival of the fittest), cited by Justice Holmes in his dissent in *Lochner*, in favor of the more sophisticated version represented by Scottish Enlightenment philosopher Adam Smith in his twin books, *The Theory of Moral Sentiments* (1759) and *The Wealth of Nations* (1776). Adam Smith’s key concept in *The Theory of Moral Sentiments* was that individuals should behave according to the logic of an “impartial spectator.” As Adam Smith stated:

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\text{[T]o the selfish and original passions of human nature, the loss or gain of a very small interest of our own, appears to be of vastly more importance . . . than the greatest concern of another with whom we have no particular connection. . . . Before we can make any proper comparison of those opposite interests, we must change our position. We must view him, neither from our own place nor yet from his, but from the place and with the eyes of a third person who has no particular connection with either, and who judges impartially between us. . . .}
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\text{When the happiness or misery of others depends in any respect upon our conduct, we dare not, as self-love might suggest to us, prefer the interest of one to that of many. The man within immediately calls to us, that we value ourselves too much and other people too little, and that by doing so we render ourselves the proper object of contempt and indignation of our brethren.}\]


\(^{20}\) Id. at 504-06.

As discussed in *The Wealth of Nations*, the value of competitive markets is to channel any latent selfish passions, which the “impartial spectator,” our conscience, may not succeed in controlling, into moral behavior. In a perfectly competitive market, an egotistic person will behave in the same way as a moral person due to the pressures of supply and demand. Hence, in Adam Smith’s phrase, the “unseen hand” of the market works to the benefit of society.

Adam Smith’s support for competitive markets assumes a number of things. First, market perversions, such as monopolistic or oligopolistic pricing, should not occur. Second, since selfish passions are immoral, any attempt to pervert the market mechanism for one’s own benefit is immoral. Third, Smith does not legitimate unfair dealing between parties in the market, as would occur when a buyer with less knowledge or less bargaining power is taken advantage of by a seller. Adam Smith may be the prophet of *laissez-faire*, where that term is used to caution governments to keep their hands off well-functioning market mechanisms. But Smith is not the prophet of *caveat emptor*. The impartial spectator calls to us when *caveat emptor* is used to legitimate an unfair bargain that “we value ourselves too much, and others too little.” Fourth, when a competitive market is not functioning properly, government regulation is warranted to correct that imbalance.

In contrast, the *Lochner*-era courts took few of these more sensitive moral notions of Adam Smith into account in their development of the principle of *laissez-faire*. They did allow government regulation of monopolies on grounds such businesses were “affected with the public interest.” See Barry Cushman, *Teaching the Lochner Era*, 62 St. Louis U.L.J. 537, 546 (2018). However, in other cases, such as legislation trying to correct the bargaining power disparities between corporations and workers, the *Lochner*-era courts freed businesses from a range of public interest economic legislation, which would have been upheld before the Civil War, and which were supported by the post-Civil War Progressive Movement. *Id.* at 538-62 (noting that courts used both *laissez-faire* and notions of formal “equality” or “neutrality” to hold unconstitutional what the courts viewed as “class” or “unequal” legislation trying to mitigate bargaining power advantage of business entities, as noted in this Coursebook at § 19.1 nn.11-18). The Progressive Movement, which began in the 1880s and continued into the 1920s, was a loose collection of groups who had in common a desire that problems of the time, such as achieving economic efficiency and social justice, be dealt with by scientific expertise capable of solving issues of public interest by methods other than traditional party politics. Their ideas on child labor laws, antitrust, wage and hour regulation, and the use of administrative agencies have become part of our social culture and legal system today.22

Economic growth, such as during the Roaring 20s, meant that court decisions striking down Progressive Era legislation did not undermine support for the Republican Party. In contrast, the Great Depression, which began in late 1929, brought President Roosevelt into office in 1932. The Great Depression undermined support for the Republican Party’s economic agenda, and induced a shift in a significant number of voters to conclude the Democratic Party would better protect their economic interests. This included a number of minority voters, particularly African-American voters, who prior to this time had voted for the Republican Party as the party that ended slavery.

As the formalist era came to a close, a shadow was cast over *Lochner* in 1934 by *Nebbia v. New York*. In that case, a 5-4 Court allowed New York to fix prices for milk. The 5-Justice majority of non-formalist Justices Brandeis, Stone, and Cardozo, and moderate formalists Chief Justice Hughes and Justice Roberts, rejected the argument that price fixing was unreasonable *per se* except as applied to businesses, like utilities, that are in their nature a monopoly. The Court said there is no closed class of public interest businesses, returning to a more moderate *Munn*-like approach. Four extreme formalists, Justices McReynolds, Van Devanter, Sutherland, and Butler, dissented.

Even so, *Nebbia* did not spell the end of *Lochner* review. In 1936, Justice Roberts, author of the *Nebbia* opinion, joined with the four *Nebbia* dissenters in *Morehead v. New York ex rel. Tipaldo*. Citing *Adkins v. Children’s Hospital*, which the Court had not been asked to reconsider, the Court held invalid a law providing minimum wages for women employees.

### 3. The Holmesian Era and Deference to Government: 1937-54

In 1937, when asked to reconsider *Adkins*, Justice Roberts joined the same 5-4 majority in *Nebbia* to overrule *Adkins in West Coast Hotel Co. v. Parrish*, where the Court upheld a minimum wage law for women and minors. The Court said that the liberty safeguarded by due process is a "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people" and the legislature “has a relatively wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.” During the 1940s, the Court overruled other cases that had followed *Lochner*, and upheld laws fixing maximum hours and minimum wages for both men and women, laws protecting union members, and laws on entry conditions on business.

Where dealing today with economic or social rights that are not deemed fundamental, the Court applies what is called “minimum rationality review.” The different approach for fundamental rights is addressed at § 25.1. The foundational case for minimum rationality review is *United States v.*

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23 291 U.S. 502, 529-33 (1934); *id.* at 552-59 (McReynolds, J., joined by Van Devanter, Sutherland & Butler, JJ., dissenting).


25 300 U.S. 379, 390-99 (1937), *overruling Adkins v. Children’s Hospital*, 261 U.S. 525 (1923); *id.* at 400-01 (Sutherland, J., joined by Van Devanter, McReynolds & Butler, JJ., dissenting). This followed Justice Roberts’ similar shift in the Commerce Clause cases, discussed at § 6.3 nn.12-14.

26 United States v. Darby, 312 U.S. 100 (1941).


Carolene Products Co,\textsuperscript{29} excerpted at § 17.3. In that 1938 case, the Court held that a challenger, who bears the burden of proof, must show that there is no rational basis for the legislation. Further, the existence of facts supporting the legislative judgment will be presumed, and the Court will ask whether any state of facts either known or which could reasonably be assumed affords support for the statute. Application of this approach has resulted in courts rarely declaring basic economic or social legislation invalid under the Due Process Clause since 1938.


The level of review under the Due Process Clause for standard social or economic regulations has continued the minimum rationality review of Carolene Products. For example, in 1955, in Williamson v. Lee Optical Co. of Oklahoma,\textsuperscript{30} excerpted at § 17.3, the Court rejected a challenge to an Oklahoma law that forbid an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. For the Court, Justice Douglas speculated that the legislature may have decided that in some cases the directions in a prescription regarding the fit of spectacles are essential or that the legislature sought to encourage repeated eye examinations. In 1988, in Pennell v. City of San Jose,\textsuperscript{31} the Court upheld a state rent control ordinance, saying that the Due Process Clause would not be violated by price control, so long as the law was not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." In Nordlinger v. Hahn,\textsuperscript{32} the Court upheld California Proposition 13, which limited real property taxes to 1% of assessed valuation as of 1975-76, and permitted reassessment only when sold. The Court held that Proposition 13 was rationally related to conceivable legitimate purposes of allowing people to know their tax burden at the time of purchase, avoiding taxes on appreciation due to inflation, and encouraging stable neighborhoods by creating an economic disincentive to move.

On the other hand, in Allegheny Pittsburgh Coal Co. v. County Commission,\textsuperscript{33} the Court held it was irrational for a county tax assessor to value real property at 50% of its most recent sale price, no matter when that most recent sale occurred. In Craigmiles v. Giles,\textsuperscript{34} a federal district court held that requiring individuals to have a funeral director license to sell caskets and urns was not rationally

\textsuperscript{29} 304 U.S. 144 (1938).

\textsuperscript{30} 348 U.S. 483 (1955). Cf. Sensational Smiles, LLC v. Mullen, 793 F.2d 281 (2\textsuperscript{nd} Cir. 2015) (only licensed dentists may shine light emitting diode (LED) lamp at mouth to whiten teeth rational).

\textsuperscript{31} 485 U.S. 1, 11 (1988).

\textsuperscript{32} 505 U.S. 1, 10-14 (1992).

\textsuperscript{33} 488 U.S. 336, 343-46 (1989).

\textsuperscript{34} 110 F. Supp. 2d 658, 662-64 (E.D. Tenn. 2000), aff’d, 312 F.3d 220 (6th Cir. 2002). See also St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013). But see Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (limiting sale of caskets for in-state customers to licensed funeral directors valid).
related to health concerns. In *Cornwell v. Hamilton*, a federal district court held that it was an unconstitutional irrational burden to apply cosmetology regulations to a hair braider whose activities involved only a small overlap with subjects covered by the regulations.

Some state courts have interpreted a due process clause in their state constitutions to call for more vigorous review than used by the Supreme Court. For example, in 1952, in *Day-Brite Lighting, Inc. v. Missouri*, the United States Supreme Court upheld a state statute requiring an employer to give employees four hours to vote on election day, without loss of pay. In 1955, in *Heimgaertner v. Benjamin Electric Manufacturing Co.*, the Supreme Court of Illinois declared a similar law invalid under its state constitution. Since 1937, the United States Supreme Court has indicated that it will not return to the kind of review found in *Lochner*. In 1992, in *Planned Parenthood v. Casey*, both the joint opinion and a dissent referred to *Lochner* as wrongly decided, noting it was properly overruled in *West Coast Hotel Co. v. Parrish*. Even at the state level, such use is in decline.

In applying the *Carolene Products* minimum rationality review test, the court will ask if the statute is rationally related to advancing legitimate interests. This “rational related” inquiry has two parts. First, there is a focus on how the statute is related to achieving its benefits. Under this benefits inquiry, the court will look at both: (1) the extent to which the statute fails to regulate all individuals who are part of some problem (the underinclusiveness inquiry); and (2) the way in which the statute serves to achieve its benefits on those whom the statute does regulate (the service inquiry). Although under a pristine analysis the Court should consider only the underinclusiveness inquiry under the Equal Protection Clause, addressed at § 19.1 n.40, and reserve the service inquiry for the Due Process Clause, as discussed below the Court has not typically disciplined its analysis this way.

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40 See generally R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden*, 28 U. Richmond L. Rev. 1279, 1281, 1288 (1994). For discussion of a split among various lower federal courts and state courts on whether “economic protectionism” can ever be a legitimate benefit, outside areas like the dormant commerce clause where it is clearly illegitimate, see Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286-88 (2nd Cir. 2015).
A second aspect of whether a statute is “rational related” to advancing its ends focuses on the burdens of the statute. This burden inquiry also has two parts: (1) the extent to which the statute imposes burdens on individuals who are not part of the problem that is being regulated (the overinclusiveness inquiry); and (2) the amount of the burden on individuals who are properly regulated by the statute (the oppressiveness or restrictiveness inquiry).\(^{41}\) Again, although under a pristine analysis the Court probably should consider only the overinclusiveness inquiry under Equal Protection Clause analysis, discussed at § 19.1 nn.41-42, and reserve the restrictiveness inquiry for Due Process Clause analysis, the Court has not disciplined its analysis in this way either.

This separation in approaches under the Equal Protection and Due Process Clauses makes logical sense. In theory, a statute that is neither underinclusive nor overinclusive, but which only minimally serves the government’s interests, or greatly burdens individuals, does not deny a citizen equal protection of the laws, because the law is equally applied to all similarly situated parties. It may, however, deny the citizen substantive due process if the burden is sufficiently great compared to the minimal benefit that is achieved. In practice, this separation of inquiries may make little difference, since under a complete review of the constitutionality of rights under the Equal Protection and Due Process Clauses, all benefit and burden inquiries should be considered. Perhaps for this reason, the Court tends to consider all the above stated inquiries in any Equal Protection or Due Process case.

\section{17.2 Pre-1937 Economic Due Process Cases}

\textbf{Lochner v. New York}  
198 U.S. 45 (1905)

Justice PECKHAM delivered the opinion of the court.

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case . . . which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. . . . The mandate of the statute that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employee may desire to earn the extra money, . . . but this statute forbids the employer from permitting the employee to earn it.

\(^{41}\) \textit{Id.} at 1281, 1298.
The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U.S. 578. Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas, 123 U.S. 623; In re Kemmler, 136 U.S. 436; Crowley v. Christensen, 137 U.S. 86.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail – the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the state.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext – become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.
We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden v. Hardy* [Ed.: maximum 8 hour day for miners working underground because of concern with black lung disease] and *Jacobson v. Massachusetts* [Ed.: law requiring small pox vaccination or pay a fine of $5].

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines.
It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The state in that case would assume the position of a supervisor, or pater familias, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserv the public health or welfare.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York as well as that of the Supreme Court and of the County Court of Oneida County must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.
Justice HARLAN, with whom Justice WHITE and Justice DAY concurred, dissenting.

Speaking generally, the state, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to every one, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." This was declared in Allgeyer v. Louisiana, 165 U.S. 578, 589. But in the same case it was conceded that the right to contract in relation to persons and property or to do business, within a State, may be "regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes." [Id. at] 591.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said, "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." Jacobson v. Massachusetts, 197 U.S. 11.

Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In Jacobson v. Massachusetts, [197 U.S. 11, 31 (1905) (compulsory small pox vaccination law constitutional)], we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only "when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law"—citing Mugler v. Kansas, 123 U.S. 623, 661; Minnesota v. Barber, 136 U.S. 313, 320: Atkin v. Kansas, 191 U.S. 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which is power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. McCulloch v. Maryland, 4 Wheat. 316, 421.
Let these principles be applied to the present case. By the statute in question it is provided that, "No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work."

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments.

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring cities and resulted in measures for the sanitary protection of the bakers."
We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the states. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state, and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the state has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason – and such is an all-sufficient reason – it is not shown to be plainly and palpably inconsistent with that instrument.

Justice HOLMES dissenting.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U.S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. Otis v. Parker, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. Holden v. Hardy, 169 U.S. 366. Some of these
laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Part of the difference in the result between majority and dissent in *Lochner* is no doubt the fact that the majority put the burden on the government to defend its statute, similar to *Maine v. Taylor*, discussed at § 13.3.1(D) nn.37-38, while Justice Harlan’s Holmesian deference-to-government dissent, joined by moderate formalists Justices White and Day, put the burden on the challenger to prove the government’s reasons were not sufficient, similar to the *Pike v. Bruce Church* test under dormant commerce clause review, discussed at § 13.3.1(D) n.39. Justice Harlan indicated in his dissent, “If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.”

The tests of *Maine v. Taylor* and *Lochner v. New York* are similar in another way. Under *Taylor*, pure economic protectionism is an illegitimate interest that cannot be used to justify a burden on interstate commerce. Under *Lochner*, pure economic regulation of the free market was viewed as an illegitimate government interest. This was based, in part, on a view that the 14th Amendment Due Process Clause reflected a belief in economic Social Darwinism, or as phrased in Justice Holmes’ dissent in *Lochner*, “Mr. Herbert Spencer’s Social Statics.” Under this view, only government regulations for health and safety reasons, morals, or businesses affected with the public interest reflected legitimate government reasons for regulating.

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42 *Lochner*, 198 U.S. at 68 (Harlan, J., joined by White & Day, JJ., dissenting).

43 *Id.* at 75 (Holmes, J., dissenting).
Muller v. Oregon
208 U.S. 412 (1908)

Justice BREWER delivered the opinion of the court.

On February 19, 1903, the legislature of the state of Oregon passed an act (Session Laws 1903, p. 148) the first section of which is in these words:

“Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.”

Sec. 3 made a violation of the provisions of the prior sections a misdemeanor subject to a fine of not less than $10 nor more than $25. On September 18, 1905, an information was filed in the circuit court of the state for the county of Multnomah, charging that the defendant “on the 4th day of September, A. D. 1905, in the county of Multnomah and state of Oregon, then and there being the owner of a laundry, known as the Grand Laundry, in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent, and agent of said Curt Muller, in the said Grand Laundry, to require a female, to wit, one Mrs. E. Gotcher, to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon.”

A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of $10. The supreme court of the state affirmed the conviction (48 Or. 252, 85 Pac. 855), whereupon the case was brought here on writ of error.

We held in Lochner v. New York, 198 U.S. 45, that a law providing that no laborer shall be required or permitted to work in bakeries more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a state may act in this respect, we refer to the following cases in which the question has been considered: Allgeyer v. Louisiana, 165 U.S. 578; Holden v. Hardy, 169 U. S. 366; Lochner v. New York, supra.
That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, thought not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions – having in view not merely her own health, but the well-being of the race – justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence.

For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is affirmed.

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Note that the statute in *Muller* only applied to factory jobs, not jobs like being a secretary, nurse, or teacher, which were more often filled by women and paid less. Perhaps to explain the different treatment, the Court noted health concerns are greater for jobs done “particularly when standing.” As noted at § 17.1.2 n.16, the practical impact of the statute in *Muller* was to favor men for employment in factory jobs, since many manufacturing plants at the time ran on two 12-hour shifts, and if women, but not men, could only work 10 hours a day, they were not as attractive employees for businesses. This may also help explain why the law applied only to factory jobs, not jobs traditionally held by women. *Muller v. Oregon* is also discussed in the context of gender discrimination at § 22.1 nn.4-5.

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**§ 17.3 Post-1937 Economic Due Process Cases**

**United States v. Carolene Products Co.**

304 U.S. 144 (1938)

Justice STONE delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923 c. 262, 42 Stat. 1486, 21 U.S.C. §§ 61-63), which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Appellee was indicted in the District Court for Southern Illinois for violation of the act by the shipment in interstate commerce of certain packages of "Milnut," a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, section 2, 21 U.S.C. § 62, that Milnut "is an adulterated article of food, injurious to the public health," and that it is not a prepared food product of the type excepted from the prohibition of the Act. The trial court sustained a demurrer to the indictment on the authority of an earlier case in the same court, *United States v. Carolene Products Co.*, 7 F. Supp. 500. The case was brought here on appeal under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, 18 U.S.C. § 682. The Court of Appeals for the Seventh Circuit has meanwhile, in another case, upheld the Filled Milk Act as an appropriate exercise of the commerce power in *Carolene Products Co. v. Evaporated Milk Assn.*, 93 F.2d 202.

Appellee assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth Amendment. Appellee also complains that the statute denies to it equal protection of the laws and, in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product "is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public."
First. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed," Gibbons v. Ogden, 9 Wheat. 1, 196, and extends to the prohibition of shipments in such commerce. Reid v. Colorado, 187 U.S. 137; Lottery Case, Champion v. Ames, 188 U.S. 321; United States v. Delaware & Hudson Co., 213 U.S. 366; Hoke v. United States, 227 U.S. 308. The power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution." Gibbons v. Ogden, supra, 196. Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, Reid v. Colorado, supra; Lottery Case, supra; Hipolite Egg Co. v. United States, 220 U.S. 45; Hoke v. United States, supra, or which contravene the policy of the state of their destination. Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334. Such regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. Seven Cases v. United States, 239 U.S. 510, 514; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156. The prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.

Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court, in Hebe Co. v. Shaw, 248 U.S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. The conclusions drawn from evidence presented at the hearings were embodied in reports of the House Committee on Agriculture, H. R. No. 365, 67th Cong., 1st Sess., and the Senate Committee on Agriculture and Forestry, Sen. Rep. No. 987, 67th Cong., 4th Sess. Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public. [FN 2: The reports may be summarized as follows: There is an extensive commerce in milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste...]

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and appearance and are distributed in packages resembling those in which pure condensed milk is distributed. By reason of the extraction of the natural milk fat the compounded product can be manufactured and sold at a lower cost than pure milk. Butter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition and are wanting in vegetable oils. The use of filled milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces diseases which attend malnutrition. Despite compliance with the branding and labeling requirements of the Pure Food and Drugs Act, there is widespread use of filled milk as a food substitute for pure milk. This is aided by their identical taste and appearance, by the similarity of the containers in which they are sold, by the practice of dealers in offering the inferior product to customers as being as good as or better than pure condensed milk sold at a higher price, by customers' ignorance of the respective food values of the two products, and in many sections of the country by their inability to read the labels.

There is nothing in the Constitution which compels a legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional Committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult.

Third. We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. See Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584, and cases cited. The present statutory findings affect appellee no more than the reports of the Congressional committees; and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

[FN 4: There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenthi. See Stromberg v. California, 283 U.S. 359, 369-370; Lovell v. Griffin, 303 U.S. 444, 452.]
It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-714, 718-720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 284, or racial minorities, Nixon v. Herndon, supra; Nixon v. Condon, supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n.2, and cases cited.]

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. Chastleton Corporation v. Sinclair, 264 U.S. 543. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 349, 351, 352; see Whitney v. California, 274 U.S. 357, 379; cf. Morf v. Bingaman, 298 U.S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 511-512; South Carolina v. Barnwell Bros., 303 U.S. 177, 192-193. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. Price v. Illinois, 238 U.S. 446, 452; Hebe Co. v. Shaw, supra, 303; Standard Oil Co. v. Marysville, 279 U.S. 582, 584; South Carolina v. Barnwell Bros., Inc., supra, 191, citing Worcester County Trust Co. v. Riley, 302 U.S. 292, 299.
Justice BLACK concurs in the result and in all of the opinion except the part marked "Third."

Justice BUTLER, concurring.

I concur in the result. Prima facie the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial it may introduce evidence to show that the declaration of the Act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43; Manley v. Georgia, 279 U.S. 1, 6. The provisions on which the indictment rests should if possible be construed to avoid the serious question of constitutionality. Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298, 307; Panama R. Co. v. Johnson, 264 U.S. 375, 390; Missouri Pacific R. Co. v. Boone, 270 U.S. 466, 472; Richmond Co. v. United States, 275 U.S. 331, 346. If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment. Weaver v. Palmer Bros. Co., 270 U.S. 402, 412-13. See People v. Carolene Products Co., 345 Ill. 166; Carolene Products Co. v. McLaughlin, 365 Ill. 62; 5 N. E. 2d 447; Carolene Products Co. v. Thomson, 276 Mich. 172; 267 N.W. 608; Carolene Products Co. v. Banning, 131 Neb. 429; 268 N. W. 313. The allegation of the indictment that Milnut "is an adulterated article of food, injurious to the public health," tenders an issue of fact to be determined upon evidence.

Justice McREYNOLDS thinks that the judgment should be affirmed. [Ed.: i.e., dissenting]

Justice CARDOZO and Justice REED took no part in the consideration or decision of this case.

In the famous footnote 4, Justice Stone added that a different approach, and a weaker presumption of constitutionality, might be used for laws that are within a specific prohibition of the Constitution, which restrict political processes, or which prejudice discrete and insular minorities. This footnote later helped to justify heightened scrutiny for fundamental rights, as noted at § 19.1 n.46, and for suspect or quasi-suspect classes under the Equal Protection Clause, as noted at § 19.1 nn. 48-49.

Williamson v. Lee Optical Co. of Oklahoma
348 U.S. 483 (1955)

Justice DOUGLAS delivered the opinion of the Court.

This suit was instituted in the District Court to have an Oklahoma law, 59 Okl. Stat. Ann. §§ 941-947, Okl. Laws 1953, c. 13, §§ 1-8, declared unconstitutional and to enjoin state officials from enforcing it, 28 U.S.C. §§ 2201, 2202, 2281, for the reason that it allegedly violated various provisions of the Federal Constitution. The matter was heard by a District Court of three judges, as required by 28 U.S.C. § 2281. That court held certain provisions of the law unconstitutional. 120 F.Supp. 128. The case is here by appeal, 28 U.S.C. § 1253.
The District Court held unconstitutional portions of three sections of the Act. First, it held invalid under the Due Process Clause of the Fourteenth Amendment the portions of § 2 which make it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

The effect of § 2 is to forbid the optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. In practical effect, it means that no optician can fit old glasses into new frames or supply a lens, whether it be a new lens or one to duplicate a lost or broken lens, without a prescription. The District Court conceded that it was in the competence of the police power of a State to regulate the examination of the eyes. But it rebelled at the notion that a State could require a prescription from an optometrist or ophthalmologist “to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer.” 120 F.Supp., at page 135. It held that such a requirement was not “reasonably and rationally related to the health and welfare of the people.” Id., at 136. The court found that through mechanical devices and ordinary skills the optician could take a broken lens or a fragment thereof, measure its power, and reduce it to prescriptive terms. The court held that “Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved.” Id., at 137. It was, accordingly, the opinion of the court that this provision of the law violated the Due Process Clause by arbitrarily interfering with the optician's right to do business.

We think the due process question is answered in principle by Roschen v. Ward, 279 U.S. 337, which upheld a New York statute making it unlawful to sell eyeglasses at retail in any store, unless a duly licensed physician or optometrist were in charge and in personal attendance. The Court said, “. . . wherever the requirements of the act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil.” Id., 279 U.S. at page 339.

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every
respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See Nebbia v. People of State of New York, 291 U.S. 502; West Coast Hotel Co. v. Parrish, 300 U.S. 379; Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236; Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525; Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220; Day-Brite Lighting, Inc., v. State of Missouri, 342 U.S. 421. We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 94 U.S. 113, 134, “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”

Justice HARLAN took no part in the consideration or decision of this case.

§ 17.4 Due Process Limits on Punitive Damage Awards

One area where the Court has been more vigorous than minimum rational review in terms of a non-fundamental liberty interest dealing with economic matters concerns punitive damages awards. In 1991, the Court held in Pacific Mutual Life Insurance Co. v. Haslip that punitive damages awards in civil cases can be limited by the Due Process Clause, although not by the Excessive Fines Clause of the Eighth Amendment, which only applies to criminal matters. Opinions in Haslip, and later cases involving attempts by the Court to define precisely when the Due Process Clause has been violated by a punitive damages award, contain arguments which mirror those found in other cases. Instrumentalist Justices focus on fundamental fairness, Holmesians are concerned about a lack of respect for legislative and executive practice, formalists object to the Court interfering with legal traditions through creating rights not explicitly mentioned in constitutional text, and natural law justices seek to find some reasoned accommodation.

In Haslip, Justice Blackmun's opinion sustained Alabama's method of assessing punitive damages which, in accord with common-law traditions, included trial and appellate review of court-instructed jury verdicts. Blackmun's conclusion was reached only after a determination, consistent with instrumentalist emphasis on "fundamental fairness," that Alabama's method was not inherently unfair in light of "general concerns of reasonableness and adequate guidance from the court." Justice Scalia, concurring from his formalist perspective, said that it was not appropriate for the Court to decide, from time to time, whether a process approved by the legal traditions of our people is "due process." He said that jury-assessed punitive damages are valid because no Bill of Rights provision is implicated, and due process is not violated if a particular procedure is traditional.45


45 Id. at 15-24 (Blackmun, J., opinion); id. at 24-26 (Scalia, J., concurring in the judgment).
Several natural law Justices staked out intermediate positions. Concurring, Justice Kennedy agreed with Justice Scalia that the judgment of history was relevant to the outcome of this case, but he added that widespread adherence to a historical practice does not always foreclose further inquiry. Dissenting, Justice O'Connor said that changes in circumstances may lead to a loss of confidence that even ancient procedures are capable of producing fair and reasonable results. "When we lose that confidence, a change must be made."46

The next case in this series was *TXO Production Corp. v. Alliance Resources Corp.*,47 decided in 1993. In this case, a plurality of three Justices noted, “In addition to the evidence that TXO knew that Alliance had good title to the oil and gas and that TXO had acted in bad faith when it advanced a claim on the basis of the worthless quitclaim deed in an effort to renegotiate its royalty arrangement, Alliance introduced evidence showing that TXO was a large company in its own right and a wholly owned subsidiary of an even larger company; that the anticipated gross revenues from oil and gas development – and therefore the amount of royalties that TXO sought to renegotiate – were substantial; and that TXO had engaged in similar nefarious activities . . . in other parts of the country. . . . The jury’s verdict of $19,000 in actual damages was based on Alliance’s cost of defending the declaratory judgment action. It is fair to infer that the punitive damage award of $10 million was based on [the] other evidence.” In concluding that the punitive damage award did not violate the Due Process Clause, these three Justices were joined by Justice Kennedy, who focused less on the amount of punitive damages, and more on whether the reasons for the award “resulted from bias, passion, or prejudice,” and Justices Scalia and Thomas, who rejected the idea of the Court reviewing punitive damage awards under the 14th Amendment.48 Justices White, O’Connor, and Souter dissented, concluding that the punitive damage award was impermissibly high.49

The next case in this series was *BMW of North America, Inc. v. Gore,*50 excerpted below at § 17.4, decided in 1996. There, in a 5-4 opinion, the Court struck down for the first time a punitive damages award as excessive. The Court said that an award enters the zone of arbitrariness that violates due process if the award is “grossly excessive” in relation to the state’s legitimate interests in punishment and deterrence. Justice Stevens said three "guideposts" sustained the conclusion that

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46 Id. at 40-42 (Kennedy, J., concurring in the judgment); id. at 63 (O’Connor, J., dissenting).


48 Id. at 462 (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J.); id. at 466-69 (Kennedy, J., concurring in part and concurring in the judgment) (“this case is close and difficult”); id. at 470-71 (Scalia, J., joined by Thomas, J., concurring in the judgment) (rejecting due process review of punitive damage awards).

49 Id. at 472-73, (O’Connor, J., joined by White & Souter, JJ., dissenting) (“likely, if not inescapable, that the jury was influenced unduly by TXO’s out-of-state status and its large resources”).

here the award was grossly excessive: (1) the slight degree of reprehensibility of the nondisclosure; (2) the disparity between the harm suffered by the plaintiff and the punitive damages award; and (3) the difference between this remedy and the smaller civil penalties authorized or imposed by law in comparable cases.

Justice Scalia, dissenting with Justice Thomas, said that a procedure which subjects a jury verdict to some judicial review for reasonableness furnishes a defendant with all the process that is "due." He said that the doctrine adopted by the Court does not deserve to have a stare decisis effect because it is not only mistaken, but also insusceptible of principled application. He said that application of the Court's new rule of constitutional law, unconnected to any clear text or specific intent of the framers and ratifiers, is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of an award.51 Also dissenting was Justice Ginsburg, joined by Chief Justice Rehnquist. Justice Ginsburg said that in view of reform measures recently adopted or under consideration in Alabama, the Court should resist unnecessary intrusion into an area predominantly of state concern. Further, reviewing the size of a punitive damages award is a task for which the Court is not well equipped and for which the majority opinion admits that it has no mathematical formula, no categorical approach, and no bright line. It has only a "vague concept of substantive due process, a 'raised eyebrow' test . . . as its ultimate guide."52

Justices Scalia’s and Ginsburg’s concern with predictability was addressed in 2003 in State Farm Mutual Automobile Insurance Co. v. Campbell.53 In Campbell, the Court indicated that while a punitive damages award only 4 times higher than a compensatory damages award will rarely cause due process problems, a ratio of 10:1 or higher will be viewed quite suspiciously under the BMW factor balancing approach. The Court stated, “We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence, and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. While these ratios are not binding, they are instructive.” As in BMW, Justices Scalia and Thomas dissented, reiterating that from a formalist perspective the Court’s doctrine was unconnected to any clear text in the Constitution or specific intent of the framers and ratifiers. As in BMW, Justice Ginsburg also dissented in the case, although Chief Justice Rehnquist switched sides and joined the majority opinion, apparently convinced that the approach in Campbell was now predictable enough.

The Court also underscored in Campbell the doctrine mentioned briefly in BMW that, based on concerns with federalism, one state “cannot” punish a defendant for actions in another state that are lawful in that state, and, “as a general rule,” a state may not “punish a defendant for unlawful acts committed outside of the State's jurisdiction.” On the other hand, the Court did permit out-of-state

51 Id. at 607 (Scalia, J., joined by Thomas, J., dissenting).
52 Id. at 613 (Ginsburg, J., joined by Rehnquist, C.J., dissenting).
53 538 U.S. 408, 425 (2003); id. at 429 (Scalia, J., dissenting); id. at 429-30 (Thomas, J., dissenting); id. at 430-31 (Ginsburg, J., dissenting).
conduct to be used to demonstrate deliberateness and culpability of in-state conduct to bolster the reprehensibility factor under the 3-factor BMW approach.54

Following Campbell, federal and state courts have decided hundreds of cases involving the excessiveness of punitive damages awards. In many of these cases, the awards were determined to be excessive. On the other hand, in some cases, as for “false arrest,” where economic damages can be predicted to be small, or for very egregious misconduct, such as fraud, punitive damages awards have been upheld with very large ratios between punitive and compensatory damages.55 In Philip Morris USA, Inc. v. Williams,56 the Court considered whether or not a punitive damage award of $79.5 million atop a compensatory damage award of $821,000, a ratio of 97:1, was “grossly excessive,” given defendant’s long-standing fraudulent conduct toward this plaintiff and others regarding the safety of smoking. In an earlier case, Boeken v. Philip Morris USA, Inc.,57 where a smoker who contracted cancer and brought an action against Philip Morris, alleging negligence, strict product liability, and fraud, was awarded by the jury $5,539,127 in compensatory damages and punitive damages of $3 billion (ratio roughly 540:1), a California trial court judge reduced punitive damages to $100 million (ratio roughly 18:1), and, on appeal, the California appellate court reduced the punitive damages award to $50 million, bringing the ratio to single-digits of 9:1. As required by Campbell, in all of these cases appellate courts use a de novo standard of review, not deference to the district court on “excessiveness,” since “excessiveness” is a mixed question of law and fact.58

In Philip Morris USA, Inc. v. Williams, cited above, the Court reiterated the view that states may only impose punitive damages for wrongful conduct occurring in their state, not in other states, but that conduct in other states can affect how reprehensible the in-state conduct is viewed. The Court


55 Compare Daka Inc. v. McCrae, 839 A.2d 682, 697-701 (D.C. 2003) (punitive damages of $4.8 million atop $187,500 award for compensatory damages (ratio 26:1) excessive for employer’s negligent supervision of manager and retaliation against plaintiff for reporting manager’s sexual harassment) with Romanski v. Detroit Entertainment, L.L.C., 428 F.3d 629 (6th Cir. 2005) (punitive damages of $600,000, roughly 60% of casino’s daily intake, for false arrest of casino patron, not excessive); Mathias v. Accor Economy Lodging Inc., 347 F.3d 672, 675-78 (7th Cir. 2003) (punitive damage award of $186,000 atop $5,000 compensatory damage award (37:1 ratio) not excessive to guests of motel, where motel concealed its bedbug infestation). See generally Kathleen S. Kizer, California’s Punitive Damages Law: Continuing to Punish and Deter Despite State Farm v. Campbell, 57 Hastings L. Rev. 827 (2006); Nitin Sud, Punitive Damages: Achieving Fairness and Consistency After State Farm v. Campbell, 72 Def. Counsel J. 67, 74-78 (2005).


58 538 U.S. at 418 (de novo standard used, as is usual for mixed questions of law and fact).
avoided discussing the constitutionality of the punitive damage award amount by remanding the case to the Oregon Supreme Court to reconsider its opinion in light of the view that only in-state conduct can be used to determine punitive damage awards.\(^5^9\) On remand, the Oregon Supreme Court adhered to its previous result and upheld the punitive damage award. The Supreme Court granted certiorari, but dismissed the writ as improvidently granted.\(^6^0\)

In *Exxon Shipping Co. v. Baker*,\(^6^1\) the Court considered limits on the punitive damage award in a maritime case (the Exxon Valdez oil spill). In a 5-3 decision, Justice Alito not participating because of his ownership of Exxon stock, Justice Souter wrote for the Court that a 1:1 ratio between compensatory and punitive damages (in this case $507.5 million) is a fair upper limit in a maritime case where the tort action was worse than negligence but less than malicious. He said that the Court was reviewing the award in the exercise of federal maritime common law jurisdiction, and that fairness required that a penalty should be reasonably predictable in its severity. In one dissent, Justice Stevens said that Congress was better equipped than the Court to determine rules regarding punitive damages in maritime cases. Justice Ginsburg agreed with Justice Stevens on this point. In his dissent, Justice Breyer indicated he saw no reason to depart from the Ninth Circuit’s judgment, given the Court of Appeals extensive review of the egregious nature of Exxon’s actions. The Ninth Circuit had reduced the jury and trial court’s punitive damage award of $5 billion to $2.5 billion.\(^6^2\)

Justice Souter replied to the dissents by noting that modern-day maritime cases support taking judicial action to modify a common-law landscape largely of the Court’s own making.\(^6^3\) Justice Souter’s opinion in *Exxon Shipping* was clearly directed to maritime common law and not constitutional limitations. However, his concern about large punitive damage awards would seem to extend to reasoning about constitutional limits. On the other hand, because it involved statutory damages under maritime law, his majority opinion was joined by Justices Scalia and Thomas. Those Justices reiterated their view they do not believe the 14th Amendment imposes any due process limit

\(^{59}\) 127 S. Ct. at 1065. Justice Stevens dissented from the conclusion that only in-state conduct can form the basis for a punitive damage award. *Id.* at 1066 (Stevens, J., dissenting). Justice Ginsburg, joined by Justices Scalia and Thomas, dissented from the Court’s remand, based on the view that the Oregon Supreme Court had applied a proper “in-state only” standard. *Id.* at 1068 (Ginsburg, J., joined by Scalia & Thomas, J.J., dissenting).


\(^{62}\) *Id.* at 2634-35 (Stevens, J., concurring in part and dissenting in part); *id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part); *id.* at 2640-41 (Breyer, J., concurring in part and dissenting in part).

\(^{63}\) *Id.* at 2629-30.
An additional issue which has arisen is whether due process analysis of punitive damages awards applies to arbitration awards, since technically arbitration is private dispute resolution that would not trigger a finding of state action. The relevant legal question is whether court enforcement of an arbitration award is state action under *Shelley v. Kraemer*, excerpted at § 15.3. As noted at § 15.3 nn.23-25, the Court has read *Shelley* narrowly outside the context of race discrimination cases. On the other hand, given the amount of arbitration that occurs, the Court may feel some pressure to decide that *Shelley* does apply to have an effective remedy for excessive punitive damages awards. Naturally, this concern predominantly applies to arbitration of tort cases or violations of statutory rights, like some civil rights statutes, for which violations might trigger a punitive damages award. In virtually all contract cases, punitive damages are not able to be granted as a matter of law.

The future development of issues surrounding punitive damages awards is difficult to predict. Justice Thomas will likely continue to dissent from Court scrutiny of punitive damages awards. Justice Ginsburg has indicated great reluctance to overrule punitive damages awards. On the other hand, Justice Breyer joined Justice Kennedy’s majority opinion in *Campbell*, and Chief Justice Roberts joined Justice Kennedy in both *Phillip Morris USA, Inc. v. Williams* and *Exxon Shipping*. Whether Justice Alito or Gorsuch will join with Justice Thomas, or join with Chief Justice Roberts, is unknown. Also unknown is whether Justices Sotomayor and Kagan will take the same view as Justice Ginsburg, or will take more the views of Justices Stevens and Souter, whom they replaced. In short, it is not clear to what extent the BMW kind of review will survive, and in what form, in the future. It is possible that a majority of some combination of Justices Thomas, Alito, and Gorsuch, and Ginsburg, Sotomayor, and Kagan, could limit or kill, BMW kind of review.

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**BMW of North America, Inc. v. Gore**  
517 U.S. 559 (1996)

Justice STEVENS delivered the opinion of the Court.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a “‘grossly excessive’” punishment on a tortfeasor. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (and cases cited). The wrongdoing involved in this case was the decision by

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64 *Id.* at 2634 (Scalia, J., joined by Thomas, J., concurring).

a national distributor of automobiles not to advise its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price. The question presented is whether a $2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit.

In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to “Slick Finish,” an independent detailer, to make it look “‘snazzier than it normally would appear.’” 646 So.2d 619, 621 (Ala.1994). Mr. Slick, the proprietor, detected evidence that the car had been repainted. Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles. Dr. Gore alleged, inter alia, that the failure to disclose that the car had been repainted constituted suppression of a material fact. The complaint prayed for $500,000 in compensatory and punitive damages, and costs.

At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the $601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of $4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged and repaired. To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $300 per vehicle. Using the actual damage estimate of $4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

In defense of its disclosure policy, BMW argued that it was under no obligation to disclose repairs of minor damage to new cars and that Dr. Gore's car was as good as a car with the original factory finish. It disputed Dr. Gore's assertion that the value of the car was impaired by the repainting and argued that this good-faith belief made a punitive award inappropriate. BMW also maintained that transactions in jurisdictions other than Alabama had no relevance to Dr. Gore's claim.

The jury returned a verdict finding BMW liable for compensatory damages of $4,000. In addition, the jury assessed $4 million in punitive damages, based on a determination that the nondisclosure policy constituted “gross, oppressive or malicious” fraud. See Ala. Code §§ 6-11-20, 6-11-21 (1993).
BMW filed a post-trial motion to set aside the punitive damages award. The company introduced evidence to establish that its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers. The most stringent of these statutes required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs. Relying on these statutes, BMW contended that its conduct was lawful in these States and therefore could not provide the basis for an award of punitive damages.

BMW also drew the court's attention to the fact that its nondisclosure policy had never been adjudged unlawful before this action was filed. Just months before Dr. Gore's case went to trial, the jury in a similar lawsuit filed by another Alabama BMW purchaser found that BMW's failure to disclose paint repair constituted fraud. Yates v. BMW of North America, Inc., 642 So.2d 937 (Ala.1993). Before the judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States. When the $4 million verdict was returned in this case, BMW promptly instituted a nationwide policy of full disclosure of all repairs, no matter how minor.

The trial judge denied BMW's post-trial motion, holding, *inter alia*, that the award was not excessive. On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. 646 So.2d 619 (1994). The court's excessiveness inquiry applied the factors articulated in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-224 (Ala.1989), and approved in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22. 646 So.2d, at 624-625. Based on its analysis, the court concluded that BMW's conduct was “reprehensible”; the nondisclosure was profitable for the company; the judgment “would not have a substantial impact upon [BMW's] financial position”; the litigation had been expensive; no criminal sanctions had been imposed on BMW for the same conduct; the award of no punitive damages in *Yates* reflected “the inherent uncertainty of the trial process”; and the punitive award bore a “reasonable relationship” to “the harm that was likely to occur from [BMW's] conduct as well as . . . the harm that actually occurred.” 646 So.2d, at 625-627.

The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. Id., at 627. Having found the verdict tainted, the court held that “a constitutionally reasonable punitive damages award in this case is $2,000,000,” id., at 629, and therefore ordered a remittitur in that amount. The court's discussion of the amount of its remitted award expressly disclaimed any reliance on “acts that occurred in other jurisdictions”; instead, the court explained that it had used a “comparative analysis” that considered Alabama cases, “along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser.” Id., at 628.

[T]he federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.
Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267 (1981); Haslip, 499 U.S., at 22. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. See TXO, 509 U.S., at 456; Haslip, 499 U.S., at 21. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. Cf. TXO, 509 U.S., at 456.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers. The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

We may assume, arguendo, that it would be wise for every State to adopt Dr. Gore's preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car. But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States. See Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular"). Similarly, one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, Gibbons v. Ogden, 9 Wheat. 1, 194-196 (1824), but is also constrained by the need to respect the interests of other States, see, e.g., Healy v. Beer Institute, 491 U.S. 324, 335-336 (1989) (the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres" (footnote omitted)).

We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983. But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its
residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

In this case, we accept the Alabama Supreme Court's interpretation of the jury verdict as reflecting a computation of the amount of punitive damages “based in large part on conduct that happened in other jurisdictions.” 646 So.2d, at 627. As the Alabama Supreme Court noted, neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful. “The only testimony touching the issue showed that approximately 60% of the vehicles that were refinished were sold in states where failure to disclose the repair was not an unfair trade practice.” Id., at 627, n.6. The Alabama Supreme Court therefore properly eschewed reliance on BMW's out-of-state conduct, id., at 628, and based its remitted award solely on conduct that occurred within Alabama. The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent – for reasons that we shall now address – that this award is grossly excessive.

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. We discuss these considerations in turn.

Degree of Reprehensibility

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect “the enormity of his offense.” Day v. Woodworth, 13 How. 363, 371 (1852). See also St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919) (punitive award may not be “wholly disproportioned to the offense”); Browning-Ferris Industries of Vt., Inc. v. Kelco Disposa, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (reviewing court “should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages”). This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that “nonviolent crimes are less serious than crimes marked by violence or the threat of violence.” Solem v. Helm, 463 U.S. 277, 292-293 (1983). Similarly, “trickery and deceit,” TXO, 509 U.S., at 462, are more reprehensible than negligence. In TXO, both the West Virginia Supreme Court and the Justices of this Court placed special emphasis on the principle that punitive damages may not be “grossly out of proportion to the severity of the offense.” Id., at 453, 482. Indeed, for Justice Kennedy, the defendant's intentional malice was the decisive element in a “close and difficult” case. Id., at 468.
In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, id., at 453, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct. Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. See id., at 462, n.28. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. See Gryger v. Burke, 334 U.S. 728, 732 (1948).

We recognize, of course, that only state courts may authoritatively construe state statutes. As far as we are aware, at the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively minor repairs or should be construed instead as supplementing common-law duties. A review of the text of the statutes, however, persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors. In California, for example, the disclosure statute defines “material” damage to a motor vehicle as damage requiring repairs costing in excess of 3 percent of the suggested retail price or $500, whichever is greater. Cal. Veh. Code Ann. § 9990 (West Supp.1996). The Illinois statute states that in cases in which disclosure is not required, “nondisclosure does not constitute a misrepresentation or omission of fact.” Ill. Comp. Stat., ch. 815, § 710/5 (1994). Perhaps the statutes may also be interpreted in another way. We simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages.

Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in Haslip and TXO. Haslip, 499 U.S., at 5; TXO, 509 U.S., at 453. We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists.
The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. See TXO, 509 U.S., at 459; Haslip, 499 U.S., at 23. The principle that exemplary damages must bear a “reasonable relationship” to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages. Our decisions in both Haslip and TXO endorsed the proposition that a comparison between the compensatory award and the punitive award is significant.

In Haslip we concluded that even though a punitive damages award of “more than 4 times the amount of compensatory damages” might be “close to the line,” it did not “cross the line into the area of constitutional impropriety.” 499 U.S., at 23-24. TXO, following dicta in Haslip, refined this analysis by confirming that the proper inquiry is “‘whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.’” TXO, 509 U.S., at 460 (emphasis in original), quoting Haslip, 499 U.S., at 21. Thus, in upholding the $10 million award in TXO, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.

The $2 million in punitive damages awarded to Dr. Gore . . . is 500 times the amount of his actual harm as determined by the jury. Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in Haslip and TXO.

Even assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's.

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. TXO, 509 U.S., at 458. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, “[a]s we said] in Haslip: ‘We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus.’” Id., at 458 (quoting Haslip, 499 U.S., at 18). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely “raise a suspicious judicial eyebrow.” TXO, 509 U.S., at 481 (O'Connor, J., dissenting).
Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. As Justice O'Connor has correctly observed, a reviewing court engaged in determining whether an award of punitive damages is excessive should “accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.” Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S., at 301 (opinion concurring in part and dissenting in part). In Haslip 499 U.S., at 23, the Court noted that although the exemplary award was “much in excess of the fine that could be imposed,” imprisonment was also authorized in the criminal context. In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000; other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000. Significantly, some statutes draw a distinction between first offenders and recidivists; thus, in New York the penalty is $50 for a first offense and $250 for subsequent offenses. None of these statutes would provide an out-of-state distributor with fair notice that the first violation – or, indeed the first 14 violations – of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today we see the latest manifestation of this Court's recent and increasingly insistent “concern about punitive damages that 'run wild.’” Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991). Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.

In earlier cases that were the prelude to this decision, I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for “reasonableness,” furnishes a defendant with all the process that is “due.” See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment); Haslip, supra, at 25-28 (Scalia, J., concurring in judgment); cf. Honda Motor Co. v. Oberg, 512 U.S. 415, 435-436 (1994) (Scalia, J., concurring). I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive
guarantees against “unfairness” – neither the unfairness of an excessive civil compensatory award, nor the unfairness of an “unreasonable” punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable. See TXO, supra, at 471 (Scalia, J., concurring in judgment).

This view, which adheres to the text of the Due Process Clause, has not prevailed in our punitive damages cases. See TXO, 509 U.S., at 453-462 (plurality opinion); id., at 478-481 (O'Connor, J., dissenting); Haslip, supra, at 18. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it stare decisis effect – indeed, I do not feel justified in doing so. See, e.g., Witte v. United States, 515 U.S. 389, 406 (1995) (Scalia, J., concurring in judgment); Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in judgment and dissenting in part). Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the “reasonableness” of the award in relation to the conduct for which it was assessed.

Justice GINSBURG, with whom the CHIEF JUSTICE joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. The Alabama Supreme Court, in this case, endeavored to follow this Court's prior instructions; and, more recently, Alabama's highest court has installed further controls on awards of punitive damages (see infra, at 1617-1618, n 6). I would therefore leave the state court's judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern.

Dr. Gore's experience was not unprecedented among customers who bought BMW vehicles sold as flawless and brand-new. In addition to his own encounter, Gore showed, through paint repair orders introduced at trial, that on 983 other occasions since 1983, BMW had shipped new vehicles to dealers without disclosing paint repairs costing at least $300, Tr. 585-586; at least 14 of the repainted vehicles, the evidence also showed, were sold as new and undamaged to consumers in Alabama. 646 So.2d 619, 623 (Ala.1994). Sales nationwide, Alabama's Supreme Court said, were admissible “as to the issue of a 'pattern and practice' of such acts.” Id., at 627. There was “no error,” the court reiterated, “in the admission of the evidence that showed how pervasive the nondisclosure policy was and the intent behind BMW NA's adoption of it.” Id., at 628. That determination comports with this Court's expositions. See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, and n.28 (1993) (characterizing as “well-settled” the admissibility of “evidence of [defendant's] alleged wrongdoing in other parts of the country” and of defendant's “wealth”); see also Brief for Petitioner 22 (recognizing that similar acts, out-of-state, traditionally have been considered relevant “for the limited purpose of determining that the conduct before the [c]ourt was reprehensible because it was part of a pattern rather than an isolated incident”).

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Alabama's highest court next declared that the “jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the dollar amount of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful.” 646 So.2d, at 627 (emphasis in original) (footnote omitted).

Because the Alabama Supreme Court provided this clear statement of the State's law, the multiplier problem encountered in Gore's case is not likely to occur again. Now, as a matter of Alabama law, it is plainly impermissible to assess punitive damages by multiplication based on out-of-state events not shown to be unlawful. See, e.g., Independent Life and Accident Ins. Co. v. Harrington, 658 So.2d 892, 902-903 (Ala.1994) (under BMW v. Gore, trial court erred in relying on defendant insurance company's out-of-state insurance policies in determining harm . . . ).

Because the Alabama Supreme Court provided this clear statement of the State's law, the multiplier problem encountered in Gore's case is not likely to occur again. Now, as a matter of Alabama law, it is plainly impermissible to assess punitive damages by multiplication based on out-of-state events not shown to be unlawful. See, e.g., Independent Life and Accident Ins. Co. v. Harrington, 658 So.2d 892, 902-903 (Ala.1994) (under BMW v. Gore, trial court erred in relying on defendant insurance company's out-of-state insurance policies in determining harm . . . ).

No Alabama authority, it bears emphasis – no statute, judicial decision, or trial judge instruction – ever countenanced the jury's multiplication of the $4,000 diminution in value estimated for each refinished car by the number of such cars (approximately 1,000) shown to have been sold nationwide. The sole prompt to the jury to use nationwide sales as a multiplier came from Gore's lawyer during summation. App. 31, Tr. 812-813. Notably, counsel for BMW failed to object to Gore's multiplication suggestion, even though BMW's counsel interrupted to make unrelated objections four other times during Gore's closing statement. Tr. 810-811, 854-855, 858, 870-871. Nor did BMW's counsel request a charge instructing the jury not to consider out-of-state sales in calculating the punitive damages award. See Record 513-529.

Following the verdict, BMW's counsel challenged the admission of the paint repair orders, but not, alternately, the jury's apparent use of the orders in a multiplication exercise. Curiously, during postverdict argument, BMW's counsel urged that if the repair orders were indeed admissible, then Gore would have a “full right” to suggest a multiplier-based disgorgement. Tr. 932.

In brief, Gore's case is idiosyncratic. The jury's improper multiplication, tardily featured by petitioner, is unlikely to recur in Alabama and does not call for error correction by this Court.

Because the jury apparently (and erroneously) had used acts in other States as a multiplier to arrive at a $4 million sum for punitive damages, the Alabama Supreme Court itself determined “the maximum amount that a properly functioning jury could have awarded.” 646 So.2d, at 630 (Houston, J., concurring specially) (quoting Big B, Inc. v. Cottingham, 634 So.2d 999, 1006 (Ala.1993)). The per curiam opinion emphasized that in arriving at $2 million as “the amount of punitive damages to be awarded in this case, [the court did] not consider those acts that occurred in other jurisdictions.” 646 So.2d, at 628 (emphasis in original). As this Court recognizes, the Alabama high court “properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama.” Ante, at 1598 (citation omitted).

Alabama's Supreme Court reports that it “thoroughly and painstakingly” reviewed the jury's award, ibid., according to principles set out in its own pathmarking decisions and in this Court's opinions in TXO and Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991). 646 So.2d, at 621. The
Alabama court said it gave weight to several factors, including BMW's deliberate (“reprehensible”) presentation of refinished cars as new and undamaged, without disclosing that the value of those cars had been reduced by an estimated 10%, the financial position of the defendant, and the costs of litigation. Id., at 625-626. These standards, we previously held, “impose[e] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages.” Haslip, 499 U.S., at 22; see also TXO, 509 U.S., at 462, n.28. Alabama's highest court could have displayed its labor pains more visibly, but its judgment is nonetheless entitled to a presumption of legitimacy. See Rowan v. Runnels, 5 How. 134, 139 (1847) (“[T]his court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.”).

It is perhaps useful to note the similarity between the Court’s review of “grossly excessive” punitive damage awards in BMW, and the review of “clearly excessive” state burdens on interstate commerce in dormant commerce clause cases like Pike v. Bruce Church, excerpted at 13.3.4. In each case, the Court consider three factors to determine the “excessiveness” inquiry. The first factor involves the extent of the state interest in regulation, phrased in BMW as the “reprehensibility” inquiry. The second factor involves the extent of the burden imposed by the state action, phrased in BMW as the “ratio” between compensatory and punitive damages. Third, the Court looks to reasonably available alternatives, phrased in BMW as alternative “sanctions for comparable misconduct.” In each case, these factors are balanced to determine whether the burden is excessive: “grossly excessive” as phrased in BMW; “clearly excessive” as phrased in Pike v. Bruce Church, noted at § 13.3.1(D) n.39.

In addition, in both cases the burden is on the challenger to prove the burden is “excessive,” as noted for dormant commerce clause doctrine under Pike v. Bruce Church at § 13.3.1(D) nn.39-40. Thus, an initial presumption of constitutionality applies. On the other hand, in both cases the Court does not apply a Carolene Products-style minimum rationality review deference to the state’s legislative enactment or tort law decision, but rather exercises independent review of whether the burden is “excessive,” as indicated for dormant commerce clause doctrine at § 13.3.1(D) nn.46-47, as in each case that decision is a “mixed question of law and fact.” In both cases, of course, the Court will defer to factual findings made by the trial court regarding the particular facts in the case, under the standard doctrine that appellate courts only overrule factual determinations made by a trial court if they are “clearly erroneous,” as indicated for dormant commerce clause review at § 13.3.1(D) n.49, or the even more deferential standard phrased for review of jury fact-finding, whether the conclusion is “unsupported by substantial evidence.”66

Independent of the BMW doctrine, many states have enacted “tort reform” statutes that attempt to limit the amount of damages plaintiffs can receive in state tort law claims. It has been noted: “Such measures include setting caps on contingent fees; tightening statutes of limitations or adopting statutes of repose; making certification of class actions more difficult; restructuring trials (e.g., requiring bifurcation); narrowing substantive liability standards; providing hard-look judicial review of jury findings; capping compensatory damages; eliminating the collateral-source rule; eliminating or limiting joint and several liability; and eliminating, capping, or “splitting” punitive damages.”

Given these statutes, an issue has arisen whether the individual’s “property” interest in the litigation gives rise to due process rights that would limit the ability of states through tort reform statutes to place limits on tort actions, such as capping recovery for pain and suffering or punitive damages awards. While such due process arguments have usually failed under the United States Constitution, “open courts” or “right to remedy” or “right to jury trial” provisions in a number of state Constitutions have been used to place limits on such statutory enactments, consistent with the natural law principle that “where there is a right, there should be a remedy.”

2014 WL 1612426 (April 23, 2014) (restitution for child pornography possession under 18 U.S.C. § 2259 should be awarded in amount comporting with defendant’s relevant role in “causal process” underlying victim’s losses, those losses possibly including $3 million in lost income and $500,000 in future treatment and counseling in dealing with knowledge filmed sexual assault has been, and continues to be, viewed by thousands of persons online; imposing all these losses on single or a few defendants actually convicted would likely be “excessive”; on the other hand, defendants should be “made aware, through the concrete mechanism of restitution, of the impact of child-pornography possession on victims,” and thus award should not be “trivial”) (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting) (by being one of thousands who viewed the post, defendant did not literally “cause” the harm, so no damages should be awarded; Congress should redraft statute) (Sotomayor, J., dissenting) (by viewing the post the defendant did “cause” the harm, and single or few convicted defendants should be jointly and severally liable under § 2259 for all of the victim’s losses).


CHAPTER 18: THE CONTRACT CLAUSE AND TAKINGS CLAUSE

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§ 18.1 Pre-1937 Contract Clause Doctrine

Article I, § 10, cl 1 provides, in part, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” The Marshall Court laid the foundation for the Contract Clause to become a significant restraint upon state action by holding in 1810 in *Fletcher v. Peck*\(^1\) that the Clause not only covered state interference with private contracts, but also contractual dealings with the states themselves. In *Fletcher v. Peck*, the Georgia legislature had made a land grant to certain investors, which the legislature sought to repeal upon discovery that fraud and bribery influenced passage of the legislation. A remote grantee, Fletcher, demanded rescission and restitution from his grantor, Peck, because, said Fletcher, Peck could not convey a good title after repeal of the land grant statute. Peck responded that he was a purchaser in due course and the state could not retroactively affect his title. The Supreme Court agreed with Peck. In reaching this conclusion, the Court did not limit its analysis to the specific intent of the framers and ratifiers of the Constitution. As has been noted:

The clause was included in the 1787 Constitution because of the Philadelphia framers’ dislike of state legislation that interfered with contractual relationships between private creditors and debtors, a fact of which the Court’s early membership was well aware.... Marshall argued that property grants were a form of contract in that the grantor necessarily made an implicit promise not to reassert the property rights it was granting; he then pointed out that nothing in the Constitution’s wording excepted grants generally or grants by legislatures from the protection of the contracts clause. Since the moral evil of legislative interference with “the lives and fortunes of individuals” was the same, whether worked by a bill of attainder, an ex post facto law (both clearly unconstitutional), or a law revoking a prior grant, Marshall concluded that the attempted revocation was unconstitutional. ... The fact that the clause’s framers only intended to protect private contracts from interference did not limit the Constitution’s effect when reasoning from “general principles” revealed that revocation of public grants produced an “analogous moral evil.”\(^2\)

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In several additional cases, the Marshall Court underscored the breadth of what was a protected contract. For example, in *New Jersey v. Wilson*, it invalidated a New Jersey statute that repealed a tax exemption that the legislature had granted certain lands fifty years earlier. In *Dartmouth College v. Woodward*, the Court held that a state legislature could not change the provisions of the corporate charter issued to Dartmouth College because that charter was a contract.

However, the Marshall Court did create some limitations on the Contract Clause. With respect to whether the Contract Clause applies not only to contracts made before the enactment of a law, or whether it also applies to laws affecting future contracts, the Court struck down in *Sturges v. Crowninshield* a New York law that discharged debtors' obligations if they surrendered their property. Chief Justice Marshall's opinion most easily could be read to deny any state power to pass laws regulating insolvency, but it could also be read to suggest that the only defect with the New York law was that it was retroactive, that is, it released debtors from contracts entered into before its passage. Eight years later, in 1827, in a 4-3 decision in *Ogden v. Saunders*, the Court adopted the narrower interpretation and upheld a debtor relief law that applied only to contracts entered into after its passage. Chief Justice Marshall, joined by Justices Duvall and Story, entered a rare dissent.

Subsequent to Marshall's death, the Taney Court continued the path laid out in *Ogden v. Saunders* of being more protective of states’ rights than would have been Chief Justice Marshall, mostly by weakening the restraining power of the Contract Clause by strict interpretation of state grants of power to corporations. Under such strict interpretation, much later state legislation was consistent with an earlier limited state grant of power, because the later state legislation did not “impair” any “obligation” under that limited corporate grant, thereby not triggering the Contract Clause. The Taney Court also held in *West River Bridge Co. v. Dix* that a state legislature could not convey away the power of eminent domain. However, the Taney Court used the Contract Clause to strike down state legislation 18 times in cases where such limited interpretation of state grants of power, or the power of eminent domain, were not involved.

In applying the Contract Clause doctrine, courts during the natural law era distinguished between direct impairments of contract rights, where any impairment, no matter how small, triggered

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3 11 U.S. (7 Cranch) 164, 165-67 (1812).


7 *Id.* at 332-34 (Marshall, C.J., joined by Duvall & Story, JJ., dissenting).


9 *See* BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 64 (1967).
Contract Clause problems, and state statutes focused on remedies for breach of contract, where only substantial impairments of rights would trigger an objection. For example, in 1823, the Court stated in *Green v. Biddle*, 10 “The objection to a law on the ground of its impairing the obligation of contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.” On the other hand, with regard to alteration in contract remedies, the Court stated in 1866 in *Von Hoffman v. City of Quincy*, 11 “It is competent for the States to change the form of a remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired.” This doctrine followed the prevailing model of the natural law era of phrasing doctrine as a categorical test, rather than as a balancing inquiry, as noted at § 1.1.4 n.15. This distinction between contract rights and remedies permitted states to update and modernize procedural rules and regulations without running afoul of the Contract Clause.

The formalist-era Court continued the Taney Court’s deference toward states in *Dix* and other cases by holding in 1880 in *Stone v. Mississippi* 12 that a state is without power to enter into binding contracts not to exercise its police power in the future. More generally, as stated in 1908 in *Hudson County Water Co. v. McCarter*, 13 “One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.” Even so, from 1873 to 1900, the Court used the Contract Clause to invalidate state laws in 39 cases. 14

Thereafter, use of the clause declined. States had begun in more cases to reserve the right to alter charters that they granted, and charters were drafted more carefully to preserve state flexibility. Further, the Court began to rely on substantive due process review under *Lochner v. New York* and its progeny, addressed at § 17.1.2 & 17.2, to invalidate legislation that “unreasonably” impinged on contract or property rights. This precluded the need for Contract Clause review.

An important change occurred in 1934. A 5-4 Court held in *Home Building & Loan Association v. Blaisdell*, 15 excerpted below, that a state could enact a 2-year moratorium on foreclosures of real estate mortgages to deal with the financial crisis caused by the Great Depression. The statute allowed mortgagors in default to remain in possession during the 2-year period by paying a

10 21 U.S. (8 Wheat.) 1, 84 (1823).
11 71 U.S. 535, 553 (1866).
13 209 U.S. 349, 357 (1908).
14 WRIGHT, supra note 9, at 64.
reasonable rental value to the mortgagee. Looking predominantly to literal text and specific historical intent, four extreme formalists said in dissent, “A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress.”\(^\text{16}\) The dissent emphasized the formalist view that contemporaneous sources should dominate constitutional interpretation, because the Constitution should have a fixed, static meaning at the time it is adopted.

In contrast, the moderate formalist majority, in an opinion penned by Chief Justice Hughes, noted, “While emergency does not create power, emergency may furnish the occasion for the exercise of power.”\(^\text{17}\) Looking to prior Court opinions from the founding era, the majority noted that those opinions had given greater weight in interpreting the Contract Clause to the overall purpose of the clause, and not to a rigid literalism. Thus, the Court noted that Justice Johnson had stated in 1827 in *Ogden v. Saunders*, “It appears to me, that a great part of the difficulties of the cause, arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction . . . [T]o assign to contracts, universally, a literal purport, and to exact from them a rigid literal fulfilment, could not have been the intent of the constitution.”\(^\text{18}\)

In *Blaisdell*, the two moderate formalists on the Court, Chief Justice Hughes and Justice Roberts, joined the 3 non-formalists on the Court, Justices Brandeis, Stone, and Cardozo, to form a majority upholding the state statute based on a balancing of a number of factors. Under *Blaisdell*, the statute was constitutional because it advanced “legitimate” ends of society, given the emergency created by the Depression; the means adopted in the moratorium statute reflected “reasonable” conditions appropriately tailored to advance its ends; and the statute was not “unreasonably” burdensome because it was temporary in duration and limited to the exigency which called it forth.\(^\text{19}\)

On the other hand, reflecting the view that unreasonable impairments of contract remedies were not permissible, a unanimous Court held a year later in *W.B. Worthen Co. v. Kavanaugh*\(^\text{20}\) that a state could not impair a contractual obligation where the state statute “cut down the security of a mortgage without moderation or reason [e.g., time for payment after notice enlarged from thirty to ninety days; reduced penalty for late payment from 20% to 3%; time to appear and answer after personal service extended from 5 days to six months] or in the spirit of oppression [the state] has taken from the mortgagee the quality of an acceptable investment for a rational investor.”

\(^{16}\) *Id.* at 453-54 (Sutherland, J., joined by Van Devanter, McReynolds & Butler, JJ., dissenting).

\(^{17}\) *Id.* at 426 (Hughes, C.J., for the Court).


\(^{20}\) 295 U.S. 56, 60 (1935).
Home Building & Loan Association v. Blaisdell
290 U.S. 398 (1934)

Chief Justice HUGHES delivered the opinion of the Court.

Appellant contests the validity of chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, as being repugnant to the Contract Clause (Article 1, § 10) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution. The statute was sustained by the Supreme Court of Minnesota (249 N.W. 334, 86 A.L.R. 1507; 249 N.W. 893), and the case comes here on appeal.

The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the act (Part 1, § 8). There are separate provisions in Part 2 relating to homesteads, but these are to apply “only to cases not entitled to relief under some valid provision of Part One.” The act is to remain in effect “only during the continuance of the emergency and in no event beyond May 1, 1935.” No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part 2, § 8.

The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract cause of the Federal Constitution, within the police power of the state as that power was called into exercise by the public economic emergency which the Legislature had found to exist. Attention is thus directed to the preamble and first section of the statute which described the existing emergency in terms that were deemed to justify the temporary relief which the statute affords.

In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.
While emergency does not create power, emergency may furnish the occasion for the exercise of power. “Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. Wilson v. New, 243 U.S. 332, 348.

Applying the criteria established by our decisions, we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. Block v. Hirsh, supra. The finding of the Legislature and state court has support in the facts of which we take judicial notice. Atchison, T. & S.F. Rwy. Co. v. United States, 284 U.S. 248, 260. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said (249 N.W. 334, 337), the economic emergency which threatened “the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence” was a “potent cause” for the enactment of the statute.

2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question – mortgages of unquestionable validity – the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another
aspect. The Legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

Justice SUTHERLAND, dissenting. Justice VAN DEVANTER, Justice McREYNOLDS, and Justice BUTLER concur in this opinion.

Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. The true rule was forcefully declared in Ex parte Milligan, [71 U.S. (4 Wall.) 2, 120-121 (1866) (Ed.: military power to detain civilians must remain subordinate to Article III courts)], in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist today. In that great case this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that after the lapse of more than seventy years they were sought to be avoided. “Those great and good men,” the Court said, “foresaw that troublous times would arise,
when rules and people would become restive under restraint, and seek by sharp and decisive
measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty
would be in peril, unless established by irrepealable law. The history of the world had taught them
that what was done in the past might be attempted in the future.” And then, in words the power and
truth of which have become increasingly evident with the lapse of time, there was laid down the rule
without which the Constitution would cease to be the “supreme law of the land,” binding equally
upon governments and governed at all times and under all circumstances, and become a mere
collection of political maxims to be adhered to or disregarded according to the prevailing sentiment
or the legislative and judicial opinion in respect of the supposed necessities of the hour.

The whole aim of construction, as applied to a provision of the Constitution, is to discover the
meaning, to ascertain and give effect to the intent of its framers and the people who adopted it. Lake
County v. Rollins, 130 U.S. 662, 670. The necessities which gave rise to the provision, the
controversies which preceded, as well as the conflicts of opinion which were settled by its adoption,
are matters to be considered to enable us to arrive at a correct result. Knowlton v. Moore, 178 U.S.
41, 95. The history of the times, the state of things existing when the provision was framed and
adopted should be looked to in order to ascertain the mischief and the remedy. Rhode Island v.
Massachusetts, 12 Pet. 657, 723; Craig v. Missouri, 4 Pet. 410, 431, 432. As nearly as possible we
should place ourselves in the condition of those who framed and adopted it. In re Bain, 121 U.S. 1,
12. And, if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably
possible to do so, in a way to forward the evident purpose with which the provision was adopted.

An application of these principles to the question under review removes any doubt, if otherwise
there would be any, that the contract impairment clause denies to the several states the power to
mitigate hard consequences resulting to debtors from financial or economic exigencies by an
impairment of the obligation of contracts of indebtedness. A candid consideration of the history and
circumstances which led up to and accompanied the framing and adoption of this clause will
demonstrate conclusively that it was framed and adopted with the specific and studied purpose of
preventing legislation designed to relieve debtors especially in time of financial distress. Indeed, it
is not probable that any other purpose was definitely in the minds of those who composed the
framers' convention or the ratifying state conventions which followed, although the restriction has
been given a wider application upon principles clearly stated by Chief Justice Marshall in the
Dartmouth College Case, 4 Wheat. 518, 644, 645.

I quite agree with the opinion of the Court that whether the legislation under review is wise or
unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill
presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is
whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults
cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld
when they pinch as well as when they comfort, they may as well be abandoned. Being unable to
reach any other conclusion than that the Minnesota statute infringes the constitutional restriction
under review, I have no choice but to say so.
§ 18.2  Post-1937 Contract Clause Doctrine

During the Holmesian era, the Blaisdell holding, and its focus on reasonable state regulation, was initially followed in 1939 in Honeyman v. Jacobs.21 In Jacobs, the Court applied the approach that where the state is merely altering the form of a contract remedy only substantial infringement of contract rights will trigger Contract Clause review. The Court also indicated that where the Contract Clause was triggered, review would be for “reasonableness” of state action as in Blaisdell.

After Jacobs, however, Contract Clause review for “reasonableness” began to follow the “minimum rationality review” test of Carolene Products, excerpted at §17.3, adopted by the Holmesian-era Court in 1938 for economic review of legislation under the Due Process Clause. Thus, in 1945 in East New York Savings Bank v. Hahn,22 the Court more clearly adopted the substantial deference to government approach of minimum rational review. In Hahn the Court noted that the state could advance “the sovereign right of the government to protect the . . . general welfare of the people,” whether by state ability to reform contract remedies, state ability to restrict a party to gains reasonably to be expected, or state power to react to an emergency.

The Court limited Contract Clause review even further in 1965 in El Paso v. Simmons.23 In this case, the Court upheld a state law cutting to 5 years the reinstatement rights of an interest-defaulting purchaser of land from the state. Referring to earlier cases that required a substantial impairment to trigger Contract Clause analysis for alteration of contract remedies, the Court extended that principle to conclude that only those modifications of contract rights that “substantially impair” contract rights would trigger Contract Clause review. Further, the Court continued to use a minimum rational review approach, and held that it was not an irrational burden to "restrict a party to those gains reasonably to be expected from the contract." This decision reflected the liberal instrumentalist predisposition to be more supportive of government regulation of economic activity than conservative formalist or Holmesian judges, as noted at § 1.1.4 text following note 20.

Two cases during the 1970s, however, breathed some new life into the Contract Clause. The Court held in United States Trust Co. v. New Jersey,24 excerpted below at § 18.2, that states are bound by their own financial contracts and can modify them only if reasonable and necessary to serve a legitimate public purpose. The state had sold toll bridge bonds on a promise not to finance deficits of other future mass transit facilities with revenue pledged to pay the bonds. The state legislature later broke that financial promise in a law which permitted greater use of bridge and tunnel tolls to subsidize mass transit. The Court declared that later law invalid, concluding that it was not

23 379 U.S. 497, 503-04, 515 (1965); id. at 517-18 (Black, J., dissenting) (formalist concern the Court was “balancing away” protections of the Contract Clause, albeit from a liberal formalist).
24 431 U.S. 1, 23-26 (1977); id. at 33 (Brennan, J., joined by White & Marshall, JJ., dissenting).
“necessary,” because other means were available to discourage auto use and encourage mass transit, and was not made “reasonable” by changed circumstances, because the likelihood of deficits on other mass transit facilities was well known when the bonds were sold. In this case, no substantial deference was given to the government’s action, and the Court applied a Blaisdell kind of balancing approach to determine overall “unreasonableness” of the action because in this case “the State's self-interest is at stake.”

In Allied Structural Steel Co. v. Spannaus, excerpted below at § 18.2, the Court invalidated a Minnesota law that required private employers of more than 100 employees, at least one of whom was a Minnesota resident, to pay a pension funding charge if they terminated their pension plan or closed a local office and the pension funds did not cover full benefits for all employees who had worked at least 10 years. As in United States Trust Co., the Court did not apply “minimum rationality review” deference, but rather a Blaisdell kind of reasonableness balancing. The reason here was the law regulated only a “narrow class” of actors (employers of more than 100 persons), rather than a general law dealing with a “broad societal interest.” Using Blaisdell balancing, the Court held that the challenger had met the burden to overcome the presumption of “necessity and reasonableness” of the government’s action because the law imposed a substantial impairment of a contractual relationship, an impairment that was retroactive, immediate, and severe, and the law imposed an unexpected liability in a field not before subject to regulation.

In 1983, the Court made clear in Energy Reserves Group, Inc. v. Kansas Power & Light Co., excerpted below, that the stricter standard of United States Trust and Allied Structural Steel, where the Court gives less deference to state justifications, did not apply, because the state did not impair (1) its own contractual obligations or (2) the obligations of a narrow class of contract actors, but rather was a law of general applicability. Thus, the Court applied the Carolene Products deferential standard, noting "[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."

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459 U.S. 400 (1983)

[Ed.: Plaintiff Energy Reserves (ERG) contracted to sell natural gas to Kansas Power (KPL). An escalation clause allowed the price to rise to any level fixed by the government. A new federal law fixed a maximum price of $2.08 per million BTUs, but let states regulate up to that amount. A new Kansas law then set a maximum price of $1.63. ERG sued for a declaration that the Kansas law did not apply or that, if it did, the law applied here violated the Contract Clause.]

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26 459 U.S. 400, 411-18 (1983); id. at 709-10 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (no need to address deference issue because no substantial impairment of contract).
Justice BLACKMUN delivered the opinion of the Court.

This case concerns the regulation by the State of Kansas of the price of natural gas sold at wellhead in the intrastate market. It presents a federal Contract Clause issue and a statutory issue.

II

ERG raises both statutory and constitutional issues in challenging the ruling of the Kansas Supreme Court. The constitutional issue is whether the Kansas Act impairs ERG's contracts with KPL in violation of the Contract Clause, U.S. Const., Art. I, § 16, cl. 1. The statutory issue is whether the federal enactment of § 105 triggered the governmental price escalator clause. As to the latter issue, if § 105's enactment did have that effect, ERG was entitled to a price increase on December 1, 1978. If not, ERG could rely only on the price redetermination clause for any increase. That clause could not be exercised until November 1979. The statutory issue thus controls the timing of any increase. The constitutional issue, on the other hand, affects the price that ERG may claim under either clause. If ERG prevails, the price may be escalated to the § 102 ceiling; if ERG does not prevail, the price may be escalated only to the § 109 ceiling. We consider the Contract Clause issue first.

A

Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of its people." Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 434 (1934). In Blaisdell, the Court approved a Minnesota mortgage moratorium statute, even though the statute retroactively impaired contract rights. The Court balanced the language of the Contract Clause against the State's interest in exercising its police power, and concluded that the statute was justified.

The Court in two recent cases has addressed Contract Clause claims. In United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), the Court held that New Jersey could not retroactively alter a statutory bond covenant relied upon by bond purchasers. One year later, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Court invalidated a Minnesota statute that required an employer who closed its office in the State to pay a "pension funding charge" if its pension fund at the time was insufficient to provide full benefits for all employees with at least 10 years' seniority. Although the legal issues and facts in these two cases differ in certain ways, they clarify the appropriate Contract Clause standard.

The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Allied Structural Steel Co., 438 U.S., at 244. See United States Trust Co., 431 U.S., at 17. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Allied Structural Steel Co., 438 U.S., at 245. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. United States Trust Co., 431 U.S., at 26-27. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. Id., at 31, citing El Paso v. Simmons, 379 U.S. 497, 515 (1965). In determining the extent of the
impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. Allied Structural Steel Co., 438 U.S., at 242, n.13, citing Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, United States Trust Co., 431 U.S., at 22, such as the remedying of a broad and general social or economic problem. Allied Structural Steel Co., 438 U.S., at 247, 249. Furthermore, since Blaisdell, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. United States Trust Co., 431 U.S., at 22, n. 19; Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S., at 39-40. One legitimate state interest is the elimination of unforeseen windfall profits. United States Trust Co., 431 U.S., at 31, n. 30. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." United States Trust Co., 431 U.S., at 22. Unless the State itself is a contracting party, see id., at 23, "[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id., at 22-23.

The threshold determination is whether the Kansas Act has impaired substantially ERG's contractual rights. Significant here is the fact that the parties are operating in a heavily regulated industry. See Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S., at 38. State authority to regulate natural gas prices is well established. See Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950). At the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.

Moreover, the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law. This latter provision could be interpreted to incorporate all future state price regulation, and thus dispose of the Contract Clause claim. Regardless of whether this interpretation is correct, the provision does suggest that ERG knew its contractual rights were subject to alteration by state price regulation. Price regulation existed and was foreseeable as the type of law that would alter contract obligations. Reading the Contract Clause as ERG does would mean that indefinite price escalator clauses could exempt ERG from any regulatory limitation of prices whatsoever. Such a result cannot be permitted. Hudson Water Co. v. McCarter, 209 U.S., at 357. In short, ERG's reasonable expectations have not been impaired by the Kansas Act. See El Paso v. Simmons, 379 U.S., at 515.
C

To the extent, if any, the Kansas Act impairs ERG's contractual interests, the Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation. The State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes.

The State also has a legitimate interest in correcting the imbalance between the interstate and intrastate markets by permitting intrastate prices to rise only to the § 109 level.

The Kansas Act also rationally exempts the types of new gas the production of which Congress sought to encourage through the higher § 102 prices. Finally, the Act is a temporary measure that expires when federal price regulation of certain categories of gas terminates. The Kansas statute completes the regulation of the gas market by imposing gradual escalation mechanisms on the intrastate market, consistent with the new national policy toward gas regulation.

IV

The regulation of energy production and use is a matter of national concern. Congress set out on a new path with the Natural Gas Policy Act of 1978. In pursuing this path, Congress explicitly envisioned that the States would regulate intrastate markets in accordance with the overall national policy. The Kansas Natural Gas Price Protection Act is one State's effort to balance the need to provide incentives for the production of gas against the need to protect consumers from hardships brought on by deregulation of a traditionally regulated commodity. We see no constitutional or statutory infirmity in Kansas' attempt.

Justice POWELL, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, concurring in part.

I concur in the judgment and all of the Court's opinion except Part II-C. The Court concludes in Part II-B that there has been no substantial impairment of ERG's contractual rights. The closing sentence states that "ERG's reasonable expectations have not been impaired by the Kansas Act." This conclusion is dispositive, and it is unnecessary for the Court to address the question of whether, if there were an impairment of contractual rights, it would constitute a violation of the Contract Clause. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

The Court concludes in Part II-C that even if ERG's "contractual interests" were impaired, the Act furthers "significant and legitimate state interests" and is a valid exercise of the State's police power. I do not necessarily disagree with this conclusion, particularly in the context of the pervasive regulation of public utilities. I decline to join Part II-C, however, because it addresses a substantial question and our discussion of the separate issue in Part II-B disposes of this case.
United States Trust Co. v. New Jersey
431 U.S. 1 (1977)

Justice BLACKMUN delivered the opinion of the Court.

This case presents a challenge to a New Jersey statute, 1974 N.J. Laws, c. 25, as violative of the Contract Clause of the United States Constitution. That statute, together with a concurrent and parallel New York statute, 1974 N.Y. Laws, c. 993, repealed a statutory covenant made by the two States in 1962 that had limited the ability of The Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves.

The statutory covenant of 1962 was . . . . part of the bistate legislation authorizing the Port Authority to acquire, construct, and operate the Hudson & Manhattan Railroad and the World Trade Center. The statute in relevant part read: "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) . . . and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." 1962 N.J. Laws, c. 8, § 6; 1962 N.Y. Laws, c. 209, § 6.

New Jersey had previously prevented outright repeal of the 1962 covenant, but its attitude changed with the election of a new Governor in 1973. In early 1974, when bills were pending in the two States' legislatures to repeal the covenant retroactively, a national energy crisis was developing. On November 27, 1973, Congress had enacted the Emergency Petroleum Allocation Act, 87 Stat. 627, as amended, 15 U.S.C. § 751 et seq. (1970 ed., Supp. V). In that Act Congress found that the hardships caused by the oil shortage "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare." 87 Stat. 628, 15 U.S.C. § 751 (a)(3). This time, proposals for retroactive repeal of the 1962 covenant were passed by the legislature and signed by the Governor of each State. 1974 N.J. Laws, c. 25; 1974 N.Y. Laws, c. 993.

At the time the Constitution was adopted, and for nearly a century thereafter, the Contract Clause was one of the few express limitations on state power. The many decisions of this Court involving the Contract Clause are evidence of its important place in our constitutional jurisprudence. Over the last century, however, the Fourteenth Amendment has assumed a far larger place in constitutional adjudication concerning the States.

We first examine appellant's general claim that repeal of the 1962 covenant impaired the obligation of the States' contract with the bondholders. It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. Fletcher v. Peck, 6 Cranch 87, 137-139 (1810); Dartmouth College v. Woodward, 4 Wheat. 518 (1819). Yet the Contract Clause does not prohibit the States from repealing or
amending statutes generally, or from enacting legislation with retroactive effects. Thus, as a preliminary matter, appellant's claim requires a determination that the repeal has the effect of impairing a contractual obligation.

In this case the obligation was itself created by a statute, the 1962 legislative covenant. It is unnecessary, however, to dwell on the criteria for determining whether state legislation gives rise to a contractual obligation. The trial court found, 338 A. 2d, at 866 n.38, and appellees do not deny, that the 1962 covenant constituted a contract between the two States and the holders of the Consolidated Bonds issued between 1962 and the 1973 prospective repeal. The intent to make a contract is clear from the statutory language: "The 2 States covenant and agree with each other and with the holders of any affected bonds. . . ". 1962 N.J. Laws, c. 8, § 6; 1962 N. Y. Laws, c. 209, § 6. Moreover, as the chronology set forth above reveals, the purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal. In return for their promise, the States received the benefit they bargained for: public marketability of Port Authority bonds to finance construction of the World Trade Center and acquisition of the Hudson & Manhattan Railroad. We therefore have no doubt that the 1962 covenant has been properly characterized as a contractual obligation of the two States.

The parties sharply disagree about the value of the 1962 covenant to the bondholders. Appellant claims that after repeal the secondary market for affected bonds became "thin" and the price fell in relation to other formerly comparable bonds. This claim is supported by the trial court's finding that "immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected." 338 A. 2d, at 865. Appellees respond that the bonds nevertheless retained an "A" rating from the leading evaluating services and that after an initial adverse effect they regained a comparable price position in the market. Findings of the trial court support these claims as well. 338 A. 2d, at 864-866. The fact is that no one can be sure precisely how much financial loss the bondholders suffered. Factors unrelated to repeal may have influenced price. In addition, the market may not have reacted fully, even as yet, to the covenant's repeal, because of the pending litigation and the possibility that the repeal would be nullified by the courts.

The trial court recognized that there was an impairment in this case: "To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders." 338 A. 2d, at 866.

Although the Contract Clause appears literally to proscribe "any" impairment, this Court observed in Blaisdell that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." 290 U.S., at 428. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution. In the instant case, as in Blaisdell, we must attempt to reconcile the strictures of the Contract Clause with the "essential attributes of sovereign power," id., at 435, necessarily reserved by the States to safeguard the welfare of their citizens. Id., at 434-440.
The trial court concluded that repeal of the 1962 covenant was a valid exercise of New Jersey's police power because repeal served important public interests in mass transportation, energy conservation, and environmental protection. 338 A.2d, at 873. Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power." Blaisdell, 290 U.S., at 439. Moreover, the scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts.

The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

Yet private contracts are not subject to unlimited modification under the police power. The Court in Blaisdell recognized that laws intended to regulate existing contractual relationships must serve a legitimate public purpose. 290 U.S., at 444-445. A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." Id., at 439. Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. Id., at 445-447. [FN 19: Blaisdell suggested further limitations that have since been subsumed in the overall determination of reasonableness. The legislation sustained in Blaisdell was adopted pursuant to a declared emergency in the State and strictly limited in duration. Subsequent decisions struck down state laws that were not so limited. W. B. Worthen Co. v. Thomas, 292 U.S. 426, 432-434 (1934) (relief not limited as to “time, amount, circumstances, or need”); Treigle v. Acme Homestead Assn., 297 U.S. 189, 195 (1936) (no emergency or temporary measure). Later decisions abandoned these limitations as absolute requirements. Veix v. Sixth Ward Building & Loan Assn., 310 U.S. 32, 39-40 (1940) (emergency need not be declared and relief measure need not be temporary); East New York Savings Bank v. Hahn, 326 U.S. 230 (1945) (approving 10th extension of one-year mortgage moratorium). Undoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case. As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. East New York Savings Bank v. Hahn, 326 U.S. 230 (1945).

When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that "one legislature cannot abridge the powers of a succeeding legislature." 6 Cranch, at 135. It is often stated that "the legislature cannot bargain away the police power of a State." Stone v. Mississippi, 101 U.S. 814, 817 (1880). This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the
subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.

In deciding whether a State's contract was invalid *ab initio* under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the police power and the power of eminent domain were among those that could not be "contracted away," but the State could bind itself in the future exercise of the taxing and spending powers. Such formalistic distinctions perhaps cannot be dispositive, but they contain an important element of truth. Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.

The instant case involves a financial obligation and thus as a threshold matter may not be said automatically to fall within the reserved powers that cannot be contracted away. Not every security provision, however, is necessarily financial. For example, a revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely could not validly be construed to bind the State never to close the facility for health or safety reasons. The security provision at issue here, however, is different: The States promised that revenues and reserves securing the bonds would not be depleted by the Port Authority's operation of deficit-producing passenger railroads beyond the level of "permitted deficits." Such a promise is purely financial and thus not necessarily a compromise of the State's reserved powers.

Of course, to say that the financial restrictions of the 1962 covenant were valid when adopted does not finally resolve this case. The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. Contrary to Mr. Justice Black's fear, expressed in sole dissent in *El Paso v. Simmons*, 379 U.S., at 517, the Court has not "balanced away" the limitation on state action imposed by the Contract Clause. Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its citizens.
creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.

The more specific justification offered for the repeal of the 1962 covenant was the States' plan for encouraging users of private automobiles to shift to public transportation. The States intended to discourage private automobile use by raising bridge and tunnel tolls and to use the extra revenue from those tolls to subsidize improved commuter railroad service. Appellees contend that repeal of the 1962 covenant was necessary to implement this plan because the new mass transit facilities could not possibly be self-supporting and the covenant's "permitted deficits" level had already been exceeded. We reject this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances.

The determination of necessity can be considered on two levels. First, it cannot be said that total repeal of the covenant was essential; a less drastic modification would have permitted the contemplated plan without entirely removing the covenant's limitations on the use of Port Authority revenues and reserves to subsidize commuter railroads. Second, without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. Appellees contend, however, that choosing among these alternatives is a matter for legislative discretion. But a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well. In *El Paso v. Simmons*, supra, the imposition of a five-year statute of limitations on what was previously a perpetual right of redemption was regarded by this Court as "quite clearly necessary" to achieve the State's vital interest in the orderly administration of its school lands program. 379 U.S., at 515-516. In the instant case the State has failed to demonstrate that repeal of the 1962 covenant was similarly necessary.

We also cannot conclude that repeal of the covenant was reasonable in light of the surrounding circumstances. In this regard a comparison with *El Paso v. Simmons*, supra, again is instructive. There a 19th century statute had effects that were unforeseen and unintended by the legislature when originally adopted. As a result speculators were placed in a position to obtain windfall benefits. The Court held that adoption of a statute of limitation was a reasonable means to "restrict a party to those gains reasonably to be expected from the contract" when it was adopted. 379 U.S., at 515.

By contrast, in the instant case the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known. As early as 1922, over a half century ago, there were pressures to involve the Port Authority in mass transit. It was with full knowledge of these concerns that the 1962 covenant was adopted. Indeed, the covenant was specifically intended to protect the pledged revenues and reserves against the possibility that such concerns would lead the Port Authority into greater involvement in deficit mass transit.

During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with
environmental protection and energy conservation. But these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in the light of changed circumstances.

We therefore hold that the Contract Clause of the United States Constitution prohibits the retroactive repeal of the 1962 covenant. The judgment of the Supreme Court of New Jersey is reversed.

Justice STEWART took no part in the decision of this case.

Justice POWELL took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice WHITE and Justice MARSHALL join, dissenting.

Decisions of this Court for at least a century have construed the Contract Clause largely to be powerless in binding a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity. In short, those decisions established the principle that lawful exercises of a State's police powers stand paramount to private rights held under contract. Today's decision, in invalidating the New Jersey Legislature's 1974 repeal of its predecessor's 1962 covenant, rejects this previous understanding and remolds the Contract Clause into a potent instrument for overseeing important policy determinations of the state legislature. At the same time, by creating a constitutional safe haven for property rights embodied in a contract, the decision substantially distorts modern constitutional jurisprudence governing regulation of private economic interests. I might understand, though I could not accept, this revival of the Contract Clause were it in accordance with some coherent and constructive view of public policy. But elevation of the Clause to the status of regulator of the municipal bond market at the heavy price of frustration of sound legislative policymaking is as demonstrably unwise as it is unnecessary. The justification for today's decision, therefore, remains a mystery to me, and I respectfully dissent.

The Court's consideration of this factual background is, I believe, most unsatisfactory. The Court never explicitly takes issue with the core of New Jersey's defense of the repeal: that the State was faced with serious and growing environmental, energy, and transportation problems, and the covenant worked at cross-purposes with efforts at remedying these concerns. Indeed, the Court candidly concedes that the State's purposes in effectuating the 1974 repeal were "admittedly important." Instead, the Court's analysis focuses upon related, but peripheral, matters.

For example, several hypothetical alternative methods are proposed whereby New Jersey might hope to secure funding for public transportation, and these are made the basis for a holding that repeal of the covenant was not "necessary." Setting aside the propriety of this surprising legal standard, the Court's effort at fashioning its own legislative program for New York and New Jersey is notably unsuccessful. In fact, except for those proffered alternatives which also amount to a repeal or substantial modification of the 1962 covenant, none of the Court's suggestions is compatible with the basic antipollution and transportation-control strategies that are crucial to metropolitan New
York. As the Court itself accurately recognizes, the environmental and transportation program for the New York area rests upon a two-step campaign: "The States inten[d] [1] to discourage private automobile use by raising bridge and tunnel tolls and [2] to use the extra revenue from those tolls to subsidize improved commuter railroad service." Ante, at 29. This co-ordinated two-step strategy has not been arbitrarily or casually created, but is dictated by contemporaneous federal enactments such as the Clean Air Act, and stems both from New York City's unique geographic situation n6 and from longstanding provisions in federal law that require the existence of "reasonable and just" expenses – which may include diversion to mass transit subsidies – as a precondition to any increase in interstate bridge tolls. The Court's various alternative proposals, while perhaps interesting speculations, simply are not responsive to New York's and New Jersey's real environmental and traffic problems, and, in any event, intrude the Court deeply into complex and localized policy matters that are for the States' legislatures and not the judiciary to resolve.

In brief, only by disregarding the detailed factual findings of the trial court in a systematic fashion is the Court today able to maintain that repeal of the 1962 covenant was anything but a minimal interference with the realistic economic interests of the bondholders. The record in this case fairly establishes that we are presented with a relatively inconsequential infringement of contract rights in the pursuit of substantial and important public ends. Yet, this meager record is seized upon by the Court as the vehicle for resuscitation of long discarded Contract Clause doctrine – a step out of line with both the history of Contract Clause jurisprudence and with constitutional doctrine generally in its attempt to delineate the reach of the lawmaking power of state legislatures in the face of adverse claims by property owners.

The Court today dusts off the Contract Clause and thereby undermines the bipartisan policies of two States that manifestly seek to further the legitimate needs of their citizens. The Court's analysis, I submit, fundamentally misconceives the nature of the Contract Clause guarantee.

One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. In accordance with this philosophy, the Framers of our Constitution conceived of the Contract Clause primarily as protection for economic transactions entered into by purely private parties, rather than obligations involving the State itself. See G. Gunther, Constitutional Law 604 (1975); B. Schwartz, A Commentary On the Constitution of the United States, pt. 2, The Rights of Property 274 (1965); B. Wright, The Contract Clause of the Constitution 15-16 (1938). The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

I would not want to be read as suggesting that the States should blithely proceed down the path of repudiating their obligations, financial or otherwise. Their credibility in the credit market obviously is highly dependent on exercising their vast lawmaking powers with self-restraint and discipline, and I, for one, have little doubt that few, if any, jurisdictions would choose to use their authority "so
foolish[ly] as to kill a goose that lays golden eggs for them," Erie R. Co. v. Public Util. Comm'rs, 254 U.S., at 410. But in the final analysis, there is no reason to doubt that appellant's financial welfare is being adequately policed by the political processes and the bond marketplace itself. [FN 18: And, of course, there is every reason to expect that appellant, with combined trust and fiduciary holdings of Authority bonds amounting to some $300 million, is not powerless in protecting its interests either before the state legislature or in the economic marketplace. Indeed, a myriad of sophisticated investors, investment banks, and market analysts regularly oversee the operation of the bond market and the affairs of municipalities which appear in search of credit. Accordingly, any city or State that enters the marketplace is well aware that, should it treat its creditors abusively, the market is apt to exact "justice" that is quicker and surer than anything that this Court can hope to offer.] The role to be played by the Constitution is at most a limited one. For this Court should have learned long ago that the Constitution – be it through the Contract or Due Process Clause – can actively intrude into such economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs. Because I consider the potential dangers of such judicial interference to be intolerable, I dissent.

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Allied Structural Steel Co. v. Spannaus
438 U.S. 234 (1978)

Justice STEWART delivered the opinion of the Court.

The issue in this case is whether the application of Minnesota's Private Pension Benefits Protection Act 1 to the appellant violates the Contract Clause of the United States Constitution.

On April 9, 1974, Minnesota enacted the law here in question, the Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01-181B.17. Under the Act, a private employer of 100 employees or more – at least one of whom was a Minnesota resident – who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a "pension funding charge" if he either terminated the plan or closed a Minnesota office. The charge was assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years. The Act required the employer to satisfy the deficiency by purchasing deferred annuities, payable to the employees at their normal retirement age. A separate provision specified that periods of employment prior to the effective date of the Act were to be included in the 10-year employment criterion.

During the summer of 1974 the company began closing its Minnesota office. On July 31, it discharged 11 of its 30 Minnesota employees, and the following month it notified the Minnesota Commissioner of Labor and Industry, as required by the Act, that it was terminating an office in the State. At least nine of the discharged employees did not have any vested pension rights under the company's plan, but had worked for the company for 10 years or more and thus qualified as pension obligees of the company under the law that Minnesota had enacted a few months earlier. On August 18, the State notified the company that it owed a pension funding charge of approximately $185,000 under the provisions of the Private Pension Benefits Protection Act.
The company brought suit in a Federal District Court asking for injunctive and declaratory relief. It claimed that the Act unconstitutionally impaired its contractual obligations to its employees under its pension agreement. The three-judge court upheld the constitutional validity of the Act as applied to the company, Fleck v. Spannaus, 449 F.Supp. 644, and an appeal was brought to this Court under 28 U. S. C. § 1253 (1976 ed.). We noted probable jurisdiction. 434 U.S. 1045.

There can be no question of the impact of the Minnesota Private Pension Benefits Protection Act upon the company's contractual relationships with its employees. The Act substantially altered those relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake. But it does not inexorably follow that the Act, as applied to the company, violates the Contract Clause of the Constitution.

The language of the Contract Clause appears unambiguously absolute: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10. The Clause is not, however, the Draconian provision that its words might seem to imply. As the Court has recognized, "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection." W. B. Worthen Co. v. Thomas, 292 U.S. 426, 433.

Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history. Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter.

The most recent Contract Clause case in this Court was United States Trust Co. v. New Jersey, 431 U.S. 1. In that case the Court again recognized that although the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," id., at 21, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[legislation] adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." Id., at 22. Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable.

In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. 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.
The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Here, the company's contracts of employment with its employees included as a fringe benefit or additional form of compensation, the pension plan. The company's maximum obligation was to set aside each year an amount based on the plan's requirements for vesting. The plan satisfied the current federal income tax code and was subject to no other legislative requirements. And, of course, the company was free to amend or terminate the pension plan at any time. The company thus had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.

The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan. Thus a basic term of the pension contract – one on which the company had relied for 10 years – was substantially modified. The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.

Not only did the state law thus retroactively modify the compensation that the company had agreed to pay its employees from 1963 to 1974, but also it did so by changing the company's obligations in an area where the element of reliance was vital – the funding of a pension plan.

Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like the company, closed their Minnesota offices. The company was thus forced to make all the retroactive changes in its contractual obligations at one time. By simply proceeding to close its office in Minnesota, a move that had been planned before the passage of the Act, the company was assessed an immediate pension funding charge of approximately $185,000.

Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods. Cf. the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1061 (b)(2), 1086 (b), and 1144 (1976 ed.). Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," United States Trust Co., 431 U.S., at 23, simply cannot stand in this case.
The only indication of legislative intent in the record before us is to be found in a statement in the District Court's opinion: "It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan." 449 F.Supp., at 651.

But whether or not the legislation was aimed largely at a single employer, it clearly has an extremely narrow focus. It applies only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established voluntary private pension plans, qualified under § 401 of the Internal Revenue Code. And it applies only when such an employer closes his Minnesota office or terminates his pension plan. Thus, this law can hardly be characterized, like the law at issue in the Blaisdell case, as one enacted to protect a broad societal interest rather than a narrow class.

Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the Blaisdell case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees, was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's – conditions of which the Court in Blaisdell took judicial notice.

Entering a field it had never before sought to regulate, the Minnesota Legislature grossly distorted the company's existing contractual relationships with its employees by superimposing retroactive obligations upon the company substantially beyond the terms of its employment contracts. And that burden was imposed upon the company only because it closed its office in the State.

This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. Cf. Home Building & Loan Assn. v. Blaisdell, 290 U.S., at 445. It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. Cf. Veix v. Sixth Ward Building & Loan Assn., 310 U.S. 32, 38. It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships – irrevocably and retroactively. Cf. United States Trust Co. v. New Jersey, 431 U.S., at 22. And its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

The judgment of the District Court is reversed.

Justice BLACKMUN took no part in the consideration or decision of this case.
Justice BRENNAN, with whom Justice WHITE and Justice MARSHALL join, dissenting.

In cases involving state legislation affecting private contracts, this Court's decisions over the past half century, consistently with both the constitutional text and its original understanding, have interpreted the Contract Clause as prohibiting state legislative Acts which, "[with] studied indifference to the interests of the [contracting party] or to his appropriate protection," effectively diminished or nullified the obligation due him under the terms of a contract. W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, (1935). But the Contract Clause has not, during this period, been applied to state legislation that, while creating new duties, in nowise diminished the efficacy of any contractual obligation owed the constitutional claimant. Cf. Goldblatt v. Hempstead, 369 U.S. 590 (1962). The constitutionality of such legislation has, rather, been determined solely by reference to other provisions of the Constitution, e.g., the Due Process Clause, insofar as they operate to protect existing economic values.

Today's decision greatly expands the reach of the Clause. The Minnesota Private Pension Benefits Protection Act (Act) does not abrogate or dilute any obligation due a party to a private contract; rather, like all positive social legislation, the Act imposes new, additional obligations on a particular class of persons. In my view, any constitutional infirmity in the law must therefore derive, not from the Contract Clause, but from the Due Process Clause of the Fourteenth Amendment. I perceive nothing in the Act that works a denial of due process and therefore I dissent.

I emphasize, contrary to the repeated protestations of the Court, that the Act does not impose "sudden and unanticipated" burdens. The features of the Act involved in this case come into play only when an employer, after the effective date of the Act, closes a plant. The existence of the Act's duties – which are similar to a legislatively imposed requirement of severance pay measured by the length of the discharged employees' service – is simply one of a number of factors that the employer considers in making the business decision whether to close a plant and terminate the employees who work there. In no sense, therefore, are the Act's requirements unanticipated. While the extent of the employer's obligation depends on pre-enactment conduct, the requirements are triggered solely by the closing of a plant subsequent to enactment.

The primary question in this case is whether the Contract Clause is violated by state legislation enacted to protect employees covered by a pension plan by requiring an employer to make outlays – which, although not in this case, will largely be offset against future savings – to provide terminated employees with the equivalent of benefits reasonably to be expected under the plan. The Act does not relieve either the employer or his employees of any existing contract obligation. Rather, the Act simply creates an additional, supplemental duty of the employer, no different in kind from myriad duties created by a wide variety of legislative measures which defeat settled expectations but which have nonetheless been sustained by this Court. See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Hadacheck v. Sebastian, 239 U.S. 394 (1915). For this reason, the Minnesota Act, in my view, does not implicate the Contract Clause in any way. The basic fallacy of today's decision is its mistaken view that the Contract Clause protects all contract-based expectations, including that of an employer that his obligations to his employees will not be legislatively enlarged beyond those explicitly provided in his pension plan.
Historically, it is crystal clear that the Contract Clause was not intended to embody a broad constitutional policy of protecting all reliance interests grounded in private contracts. It was made part of the Constitution to remedy a particular social evil – the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts – and thus was intended to prohibit States from adopting "as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them," [Blaisdell], 290 U.S. 398, 439 (1934). But the Framers never contemplated that the Clause would limit the legislative power of States to enact laws creating duties that might burden some individuals in order to benefit others.

In sum, in my view, the Contract Clause has no applicability whatsoever to the Act, and . . . the Act is consistent with the only relevant constitutional restriction – the Due Process Clause.

Cases decided since 1983 have continued the Energy Reserves approach to the Contract Clause. In Keystone Bituminous Coal Association v. DeBenedictis, the Court sustained a statute that barred the extraction of a percentage of coal owned by persons who held a mining estate. The Court found a substantial contract impairment, but said that restraining the companies was rationally related to protecting the environment, using a substantial deference approach. In Sveen v. Melin, the Court concluded that a Minnesota statute which provided the dissolution or annulment of a marriage automatically revokes any revocable beneficiary designation made by the individual to the individual’s now ex-spouse, even for designations made before the statute was enacted, was not a “substantial impairment” of a contract right since the individual could choose to re-designate the ex-spouse if the individual so wished. Recent Contract Clause cases are catalogued at CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (Supplement 2018 at § 22.1.5, end of section) (page 2072) (available at: http://libguides.stcl.edu/kelsomaterials).

There is no federal Contract Clause, as Art. I, § 10 only provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Also, under Art. I, § 8, cl. 4, Congress is granted the power to “establish . . . uniform Laws on the subject of Bankruptcies.” However, if federal law applies to private or government contracts, the Court will engage in review under the Due Process Clause, applying Carolene Products with its presumption of constitutionality and deferential approach to whether the government action is rationally related to a legitimate government interest.

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15 138 S. Ct. 1815 (2018). Id. at 1826 (Gorsuch, J., dissenting) (impairment of contract rights based on original meaning of the Contract Clause). See also General Motors Corp. v. Romein, 503 U.S. 181, 187-88 (1992) (Michigan statute that required employers to reimburse disabled employees for some workers' compensation benefits, even for injuries occurring before the effective date of the law, does not trigger the Contract Clause because Michigan law did not incorporate into employment contracts a right of the employer to rely on past disability compensation periods as "closed.").

§ 18.3 Basic Takings Clause Doctrine

1. Overview of Takings Clause Doctrine

The Takings Clause of the Fifth Amendment provides, “[N]or shall private property be taken for public use, without just compensation.” As this literal text indicates, there are four issues that potentially could arise in every Takings Clause case: (1) is property involved; (2) is there a taking; (3) is the taking for a public use; and (4) how to measure just compensation.

A. Is Property Involved

Regarding whether property is involved, while the ultimate issue of whether something is a property interest under the Takings Clause is a federal question, the Court predominantly looks to state property law to determine property interests, and only departs from that if it appears the state law on property is an attempt to evade federal law through a strained interpretation of what is property, or in cases where a federal statute creates a federal property interest on its own. For example, in Phillips v. Washington Legal Foundation, the majority held that interest earned on client’s funds held in a state-created Interest on Lawyers Trust Accounts (IOLTA) program, where the interest is used to fund legal services for the poor, was property of the client under Texas law. The majority stated, “The rule that ‘interest follows principal’ has been established under English common law since at least the mid-1700’s... This rule has become firmly embedded in the common law of the various States.” Also focusing on Texas property law, but adopting a different view, the 4-Justice dissent held that under Texas law since “absent the [state-created] IOLTA program’ no ‘interest’ could have been earned” on the trust funds, “the interest earned is not the client’s ‘property.’”

B. Is the Taking for a Public Use

A taking must be for a public use. If not, the taking violates due process, even if compensation is provided. Such was the case in 1896 in Missouri Pacific Railway Co. v. Nebraska, where the Court held that a statute providing that a railroad had to permit private individuals the right to store grain on its property was not for a public use. Despite this case, the Supreme Court noted in 2005 in Kelo v. City of New London, Conn, “Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”

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19 Id. at 183 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).
20 164 U.S. 403, 416-17 (1896).
As Justice O’Connor noted in dissent in 2005 in *Kelo v. City of New London, Conn.*, a controversial case of eminent domain to aid a private developer to build a waterfront project, easy cases for public use involve transferring “private property to public ownership – such as for a road, a hospital, or a military base” or transferring “private property to private parties, often common carriers, who make the property available for the public’s use – such as with a railroad, a public utility, or a stadium.” Justice O’Connor noted, however, that these two categories of “public ownership” and “use-by-the-public” are “sometimes too constricting and impractical” and that the Court has permitted “in certain circumstances and to meet certain exigencies, takings that serve a public purpose also [to] satisfy the Constitution [even] if the property is destined for subsequent private use.”

In his dissent in *Kelo*, consistent with a formalist focus on literal meaning, Justice Thomas indicated that in his view this third category was improper in its entirety, since these cases involve “public purposes,” not literally “public use.” Justice O’Connor indicated in her dissent that the “public purpose” category should apply, but only where “extraordinary precondemnation use of the targeted property inflicted affirmative harms on society – in *Berman v. Parker* through blight resulting from extreme poverty [in inner city Washington, D.C.] and in [*Hawaii Housing Authority v. Midkiff* through oligopoly resulting from extreme wealth [based on a few families historically controlling much of Hawaiian property].” In such cases, a legislative taking was warranted to eliminate the harmful use and achieve a public benefit, even if the property was turned over to private use.

The Court majority in *Kelo* read the third category of “public purpose” takings more broadly. They noted, “Promoting economic development is a traditional and long accepted function of government.” Despite this broad language, in his concurrence, which was the critical fifth vote in the case, Justice Kennedy observed: “This Court has declared that a taking should be upheld as consistent with the Public Use Clause, as long as it is ‘rationally related to a conceivable public purpose.’ . . . Th[is] determination does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.” In *Kelo*, the controversy surrounding the development project stopped the project even though the city won the lawsuit and could proceed.

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22 *Id.* at 2673 (2005) (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).

23 *Id.* at 2677-82 (Thomas, J., dissenting).


25 *Id.* at 2663.

26 *Id.* at 2669 (Kennedy, J., concurring).

C. How to Measure Just Compensation

If property has been taken for public use, just compensation must be provided. In determining the amount of that compensation, the Court has often noted that compensation is measured in terms of the reasonable market value loss to the owner at the time of the taking, rather than any gain to the taker. The Court has noted, however, that the government does not need to pay for any increase in the market value that occurred solely because the proposed taking had the effect of increasing market values. In Brown v. Legal Foundation of Washington, the follow-up case to Phillips v. Washington Legal Foundation, discussed at § 18.3.1 nn.18-19, the Court had to decide what compensation was due from the attorney keeping a client’s property in an IOLTA account. In Brown, the Court held that since no net interest could have been earned on funds deposited in the IOLTA account if the funds were deposited in a separate client account, no compensation was due.

D. Is There a Taking

At the time of ratification of the Bill of Rights in 1791, only Massachusetts and South Carolina had Takings Clauses in their state constitutions, and the provision in Massachusetts was limited to personal property, not real property. Indeed, during the 18th century, both colonial and state governments appropriated land for economic development ventures without always providing compensation, and many colonies and states provided that land would be forfeited if not used for a productive use during some period of time, like 3 years. Even when compensation was paid, it was often paid in paper currency which sometimes turned out to be virtually worthless.

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30 538 U.S. 216, 239-41 (2003) (only client funds sufficiently small that administrative costs in setting up a separate client account would be greater than interest earned were to be deposited in IOLTA account); id. at 241 (Scalia, J., joined by Rehnquist, C.J., and Kennedy & Thomas, JJ., dissenting) (compensation should be fair market value of interest actually earned in the IOLTA account, without regard to costs of hypothetically placing the funds in a separate client account).

After the adoption of the Takings Clause in the Fifth Amendment in 1791, state court judges began to use more frequently the principle of just compensation to restrain legislative takings, either based on the increasing number of provisions in state constitutions on point, or court imposition of a compensation requirement out of a sense of "natural justice" or "equity." By 1897, most state constitutions had similar Takings Clause provisions. Thus, in 1897, in *Chicago, Burlington & Quincy Railroad v. Chicago*, discussed at § 14.3.1(B) n.56, when the Takings Clause became the first Bill of Rights provision incorporated into the Due Process Clause of the 14th Amendment, incorporation meant only a national minimum approach towards takings doctrine would apply, not a new obligation was being imposed upon most states.

Today, state constitutional provisions are usually read to provide similar protection as the federal Takings Clause. They can be read, of course, by state Supreme Courts to provide greater protection than the federal Constitution. States and the federal government can also enact various "assessment" or "compensation" statutes to limit governmental activity infringing on individual property rights that would not be a constitutional taking, and can by constitutional amendment or statutory enactment ban themselves from taking property to promote private development as in *Kelo*, which a clear majority of states have done.

As for what constitutes a taking, the Court has always enforced the Takings Clause when the case involved physical invasions of real property. This was clear from Justice Chase's 1798 statement in *Calder v. Bull* that it would be unconstitutional to "take property from A and give it to B." Naturally, when the United States or individual states take physical possession of real property through "eminent domain," there is a taking and the government must pay just compensation, unless the property constitutes a public nuisance or other exception exists, as discussed at § 18.4.

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33 166 U.S. 226, 241 (1897).


36 3 U.S. (3 Dall.) 386, 388 (1798).

In *Horne v. Department of Agriculture*, 2015 WL 2473384 (June 22, 2015), the Court made clear that physical possession Takings Doctrine also applies to personal property – in this case, raisins.

Even for physical occupations that do not involve a complete taking of property, any permanent physical occupation triggers a finding that a taking has occurred. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 38 excerpted at § 18.3.2, the Court held that the mere placement of a cable box on the roof of an apartment building constituted a taking. In *Hodel v. Irving*,39 the Court held that Congress took the property of Indians when it provided that undivided fractional interests in a tribal reservation could not descend by intestacy or devise but, instead, should escheat to the tribe if the interest represented 2 percent or less of the total acreage in the tract and earned for its owner less than $100 in the preceding year. The Court thus protected the right of an owner to just compensation even involving devising very small interests in land.

The Court has also found a taking where a regulatory act had direct physical consequences. For example, in *Pumpelly v. Green Bay Co*,40 a state-constructed dam flooded a riparian owner’s fields. The dam, though not on the private owner’s property, had direct physical consequences of causing flooding on the owner’s property. The Court said that the state had to pay for a destructive taking as well as one brought about by actual physical occupation because the Takings Clause was “adopted for protection and security of the rights of the individual against the government.”

During the first part of the formalist era, as states increasingly sought to achieve public objectives by regulating the use of property, the Court was increasingly faced with deciding when, if ever, such regulations would amount to a taking. From 1877 to 1900, the Court backed away from reading the Takings Clause to cover such cases. In 1877, in *Railroad Co. v. Richmond*,41 a city had barred a railroad from operating on a particular street, even though this appeared to violate the railroad's charter. Without citing *Pumpelly*, the Court gave a more literal reading to the language of the Takings Clause, stating, "All property within the city is subject to the legitimate control of the government, unless protected by 'contract rights,' which is not the case here. Appropriate regulation of the use of property is not 'taking' property, within the meaning of the constitutional prohibition." The Court retreated even further a year later in *Transportation Co. v. Chicago*,42 where it held that government action that devalues private property, but does not directly impinge upon it, is not a taking. Justice Strong restricted *Pumpelly* to its core holding involving a situation where there was a permanent invasion of property and not merely a temporary inconvenience with respect to its use.

38 458 U.S. 419, 425-28 (1982); id. at 442-43 (Blackmun, J., joined by Brennan & White, JJ., dissenting) (*Penn Central* balancing test should be used to determining whether taking occurred).


40 80 U.S. (13 Wall.) 166, 177-78 (1872).

41 96 U.S. 521, 529 (1878).

42 99 U.S. 635, 641-42 (1878).
The Court reversed course in 1922, inaugurating modern regulatory takings clause doctrine. In Pennsylvania Coal Co. v. Mahon, a state law banned coal mining that threatened surface structures. A mining company challenged application of that law where the company, before enactment, had sold the surface rights to certain land and in the deed had retained a right to cause damage to the surface. Justice Holmes said that when regulation reaches a certain magnitude, then in most if not all cases, "there must be an exercise of eminent domain and compensation to sustain the act." It was a question of whether the regulation went "too far." The Court decided in Mahon that the law did go "too far" since there was a virtually complete destructive of the ability to mine coal.

Despite recitation of this analysis in Mahon, later case results during the formalist era were more consistent with the earlier formalist-era results. Thus, the magnitude of a regulation's impact could be quite substantial without causing a taking. For example, in 1926 in Village of Euclid v. Ambler Realty Co., the application of a city zoning plan which caused a 75% loss in value of an owner's property was not held to be a taking. On the other hand, virtually complete deprivations, as in Mahon, would be held to be a taking, even during the Holmesian deference-to-government era. For example, in 1946 in United States v. Causby, the government used a flight path less than 100 feet over a chicken farm. The impact of those flights caused substantial economic damage and the closing of the chicken farm, due to death of about 150 chickens who flew into building walls because of the fright caused by the sound, and less production of eggs by those chickens still alive.

During the instrumentalist era, the Court made several efforts to clarify the law on regulatory takings, while continuing to make it as easy as during the Holmesian era for governments to regulate without paying compensation. The leading case is Penn Central Transportation Co. v. City of New York, excerpted at § 18.3.3. In that 1978 case, Justice Brennan focused on the character of the City's action and on the nature and extent of interference with rights in the parcel as a whole. This focus on the economic impact on the property as a whole, and not just on the particular piece being regulated, is standard in Takings Clause doctrine. In deciding whether the diminution went "too far" and thus constituted a taking, or permitted "reasonable" use of the property, Justice Brennan pointed to the special significance of three factors: the economic impact of a regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action.

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43 260 U.S. 393, 415-16 (1922).
44 272 U.S. 365, 384-85, 394-97 (1926); id. at 397 (Justices Van Devanter, McReynolds, and Butler dissent, without opinion).
45 328 U.S. 256 (1946); id. at 268-69 (Black, J., joined by Burton, J., dissenting).
47 Id. at 124. See also Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986) (similar phrasing of takings test in terms of the economic impact of a regulation, interference with reasonable investment-backed expectations, and the character of the governmental action).
In applying the *Penn Central* test, the Court has continued to follow *Mahon* and *Causby* that where a complete deprivation of economically viable uses exist, a taking occurs. For example, in *Lucas v. South Carolina Coastal Council*, a statute, as applied, barred a property owner from erecting any permanent habitable structures on beachfront property. The Court held that this would be a taking if it deprived the owner of all economically beneficial uses of the property. The Court reaffirmed this *per se* rule that a taking will occur for complete deprivations of property value in *Lingle v. Chevron USA, Inc.*

The Court has addressed the appropriate standard to be applied to government action that only temporarily deprives the owner of property rights. These cases have followed the approach laid out in *Penn Central* and *Lucas*. For example, in *Tahoe-Sierra Preservation Council, Inv. v. Tahoe Regional Planning Agency*, the Court remanded for a lower court to consider whether a taking occurred in light of the *Penn Central* factors. The narrow holding was that a temporary moratorium on development while a planning agency creates a plan is not *per se* a taking even though it may deprive the property of all viable economic use during moratorium time, provided the agency is not in bad faith and the state interests are substantial. In contrast, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Court held that the Fifth and 14th Amendments require compensation assuming a land-use regulation denied owner "all use of the property," as in *Lucas*. A church was prevented from rebuilding facilities by an interim flood protection ordinance.

A third kind of government case involves a government exaction of property rights tailored for a specific individual. This kind of case occurred in *Dolan v. Tigard*, excerpted at § 18.3.4. There the Court held that where a city makes an adjudicative decision to condition the approval of a

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48 505 U.S. 1003, 1015-16 (1992); id. at 1036 (Blackmun, J., dissenting); id. at 1061 (Stevens, J., dissenting); id. at 1076 (Souter, J., opinion) (“I would dismiss the writ of certiorari in this case as having been granted improvidently.”).


50 535 U.S. 302, 326-42 (2002); id. at 343 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting) (action deprived owner of all economically viable use as in *Lucas*). See also *Arkansas Game and Fish Commission v. United States*, 133 S. Ct. 511 (2012) (temporary government-induced flooding must be tested under *Penn Central* Takings Clause doctrine, just as permanent flooding).

51 482 U.S. 304, 318-20 (1987); id. at 322 (Stevens, J., joined by Blackmun & O'Connor, JJ., as to Parts I and III, dissenting) (not clear complaint alleges taking). In *First English*, the narrow question was whether compensation was due assuming a taking had occurred. On remand, the lower state court concluded, applying *Penn Central* balancing, that no taking had occurred and the Court refused to review that decision. First English Evangelical Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), cert. denied, 493 U.S. 1056 (1990).

52 512 U.S. 374, 385-91 (1994); id. at 396-403 (Stevens, J., joined by Blackmun & Ginsburg, J.J., dissenting) (*Penn Central* balancing should be used to determine whether a taking occurred).
building permit on an individual parcel on the owner giving up some property rights, the city must show not only that there is a nexus between a legitimate state interest and the permit condition, but also that the degree of the exaction demanded by the city bears a "rough proportionality" to the projected impact of the proposed development. The Court said, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

Given this history of cases, three different standards of review exist in modern Takings Clause cases. These standards vary depending upon whether the government action is: (1) a permanent physical occupation of property, including eminent domain, which always involves a taking under Loretto; (2) a general government regulation affecting property rights, or a temporary physical occupation or regulation of property, tested under Penn Central; or (3) a government exaction of property rights tailored for a specific individual, tested under Dolan v. Tigard. Similar approaches to Takings Clause issues are reflected in most developed countries regarding eminent domain, and to a lesser extent for regulatory takings, as well as at international law for the protection of aliens owning property in other countries. Many developing countries have adopted Takings Clause doctrines, although others still reflect, either in doctrine or in practice, the colonial-era American view of limited or no protection from government appropriation.

As a final aspect of Takings Clause Doctrine, under abstention principles the Court has held that a plaintiff asserting a takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.

2. Permanent Physical Occupations of Property

Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982)

Justice MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a “taking” of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that

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a landlord must permit a cable television company to install its cable facilities upon his property. N.Y. Exec. Law § 828(1) (McKinney Supp. 1981-1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. 423 N.E.2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter) permission to install a cable on the building and the exclusive privilege of furnishing cable television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows: “On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street.” Id., at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable’s route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not “interfere with the installation of cable television facilities upon his property or premises,” and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company “in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.” The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled. In the Matter of Implementation of Section 828 of the Executive Law, No. 90004, Statement of General Policy (New York State Commission on Cable Television, Jan. 15, 1976) (Statement of General Policy), App. 51-52; Clarification of General Policy (Aug. 27, 1976), App. 68-69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements “in the absence of a special showing of greater damages attributable to the taking.” Statement of General Policy, App. 52.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated,
without qualification, that “where real estate is actually invaded by super induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” Id., 13 Wall. (80 U.S.) at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In Northern Transportation Co. v. Chicago, 99 U.S. 635 (1879), the Court held that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, e.g., Pumpelly, supra, as involving “a physical invasion of the real estate of the private owner, and a practical ouster of his possession.” In this case, by contrast, “[n]o entry was made upon the plaintiffs' lot.” 99 U.S., at 642.

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In United States v. Causby, 328 U.S. 256 (1946), the Court ruled that frequent flights immediately above a landowner's property constituted a taking, comparing such overflights to the quintessential form of a taking: “If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.” Id., at 261.

In short, when the “character of the governmental action,” Penn Central, 438 U.S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.

Justice BLACKMUN, with whom Justice BRENNAN and Justice WHITE join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that “[t]here is no set formula to determine where regulation ends and taking begins.” Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). [FN 1: See Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Andrus v. Allard, 444 U.S. 51, 65 (1979) (“There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate”); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952) (“No rigid rules can be laid down to distinguish compensable losses from noncompensable losses”); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (a takings question “is a question of degree – and therefore cannot be disposed of by general propositions”).]
In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid per se takings rule: “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between “temporary physical invasions,” whose constitutionality concededly “is subject to a balancing process,” and “permanent physical occupations,” which are “taking[s] without regard to other factors that a court might ordinarily examine.”

In my view, the Court's approach “reduces the constitutional issue to a formalistic quibble” over whether property has been “permanently occupied” or “temporarily invaded.” Sax, Takings and the Police Power, 74 Yale L.J. 36, 37 (1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. Despite its concession that “States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails,” the Court uses its rule to undercut a carefully considered legislative judgment concerning landlord-tenant relationships. I therefore respectfully dissent.

3. Regulatory Takings and Temporary Takings

Penn Central Transportation Co. v. City of New York
438 U.S. 104 (1978)

Justice BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks – in addition to those imposed by applicable zoning ordinances – without effecting a “taking” requiring the payment of “just compensation.” Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners' property in violation of the Fifth and Fourteenth Amendments.

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities
in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a “reasonable return” on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter. The rentals would be offset in part by a loss of some $700,000 to $1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, called for tearing down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of “appropriateness” as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

In conclusion, the Commission stated: “[W]e have no fixed rule against making additions to designated buildings . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The ‘addition’ would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.”

Before considering appellant’s specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the [Takings Clause]. The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be
borne by the public as a whole,” Armstrong v. United States, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); see United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See Goldblatt v. Hempstead, supra, 369 U.S., at 594. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition “would harmonize in scale, material and character with [the Terminal].” Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal [which they also own], one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New
York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted “just compensation” if a “taking” had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Cf. Goldblatt v. Hempstead, 369 U.S., at 594 n.3.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a “taking” of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

Justice REHNQUIST, with whom THE CHIEF JUSTICE and Justice STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of “landmarks” within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term “property” as used in the Taking Clause includes the entire “group of rights inhering in the citizen's [ownership].” United States v. General Motors Corp., 323 U.S. 373 (1945). The term is not used in the “vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical THING, AS THE RIGHT TO POSSESS, USE AND DISPOSE OF IT. . . . the constitutional provision is addressed to every sort of interest the citizen may possess.” Id., at 377-378 (emphasis added).

While neighboring landowners are free to use their land and “air rights” in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.

Appellees have thus destroyed – in a literal sense, “taken” – substantial property rights of Penn Central. While the term “taken” might have been narrowly interpreted to include only physical seizures of property rights, “the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.” Id., at 378.
Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were “in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416. The Court’s opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

This difference between the majority and dissenting opinion in Penn Central underscores an important aspect in the application of the Penn Central factor-balancing test. Typically, Court majorities in the post-1937 era have downplayed lost investment represented by lost opportunities to use property in a more profitable manner, and focused more on whether the individual was being deprived of a reasonable rate of return on existing investment use, as in Justice Brennan’s opinion in Penn Central. Based on straight-forward economic theory, conservative jurists typically view lost economic opportunities equally as lost returns on current investments, as in Justice Rehnquist’s concern in Penn Central that the owners were deprived of ability to build new structures on their buildings. The Court majority in Penn Central, and later cases, with Justice Kennedy following the precedent of Penn Central, continue to give lost opportunities much less weight in terms of deciding whether a particularly diminution in value is a taking because it goes “too far” or instead allows “reasonable beneficial use” of the property.56

In terms of standards of review, the Penn Central test is similar to the Pike v. Bruce Church test under dormant commerce clause doctrine, discussed at § 13.3.1(D) n.39, or the BMW test for punitive damages under the Due Process Clause, discussed at § 17.4 n.66. In each case, the Court balances the government’s interest in regulating, in Penn Central the city’s interest in Landmark Preservation; versus the plaintiff’s interest is not being burdened by the government regulation, in Penn Central the impact on the individual on investment-backed expectations and whether the individual is able to achieve a reasonable rate of return on the investment; against the backdrop of less burdensome alternatives, in Penn Central the government’s alternative of being willing to grant compensatory building rights on the plaintiff’s nearby buildings. In each case the decision at the end of the day is whether the plaintiff, who has the burden of proof, can meet the burden of showing the government action is “clearly excessive,” “grossly excessive,” or goes “too far” and thus is not “reasonable.”

In 2005, a unanimous Supreme Court clarified *Lingle v. Chevron USA, Inc.* that the *Penn Central* Takings Clause analysis reflects such a reasonableness balancing approach, and rejected loose language in earlier cases, starting in 1980 in *Agins v. City of Tiburon*, which had required the government regulation to “substantially advance” its interest. The Court specifically noted that this kind of intermediate, heightened scrutiny used under the Equal Protection Clause in some cases, addressed at § 20.1 n.12-25, was inappropriate for the issue involved in Takings Clause cases of the extent of the impairment on individual property rights. Thus, the Court held that, in the future, such cases of general government regulation affecting property rights should be analyzed only under the *Penn Central* factor-balancing approach with no “substantial advancement” requirement.

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4. Government Exactions

**Dolan v. City of Tigard**  
512 U.S. 374 (1994)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. 854 P.2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction

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progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District. CDC § 18.66.030, App. to Brief for Petitioner C-1 to C-3.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval: "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." CDC § 18.120.180.A.8, App. to Brief for Respondent B-45 to B-46.

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. App. to Pet. for Cert. G-28 to G-29. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. Id., at G-44 to G-45.

Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Nollan, supra, at 831. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In Nollan, supra, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require
a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568 (1968).

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. Nollan, 483 U.S. at 837. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in Nollan, because we concluded that the connection did not meet even the loosest standard. 483 U.S. at 838. Here, however, we must decide this question.

We addressed the essential nexus question in Nollan. The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. 483 U.S. at 828. The public easement was designed to connect two public beaches that were separated by the Nollans' property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. 483 U.S. at 835. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." 483 U.S. at 836. We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. 483 U.S. at 837. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out-and-out plan of extortion." Ibid., quoting J. E. D. Associates, Inc. v. Atkinson, 432 A.2d 12, 14-15 (1981).

No such gimmicks are associated with the permit conditions [here]. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. Agins, 447 U.S. at 260-262. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.
The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: "Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling . . . remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow." A. Nelson, Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits 11, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994).

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. Nollan, supra, at 834, quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) ("'[A] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose'"). Here the Oregon Supreme Court deferred to what it termed the "city's unchallenged factual findings" supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner's business. 854 P.2d at 443.

The city required that petitioner dedicate "to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above [the floodplain] boundary." Id., at 113, n.3. In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G-37.

The city made the following specific findings relevant to the pedestrian/bicycle pathway: "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Id., at G-24.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. See, e.g., Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966). We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.
Other state courts require a very exacting correspondence, described as the "specific and uniquely attributable" test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (1961). [FN7: The "specifically and uniquely attributable" test has now been adopted by a minority of other courts. See, e.g., J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12, 15 (1981); Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne, 334 A.2d 30, 40 (1975); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (1971); Frank Ansuini, Inc. v. Cranston, 264 A.2d 910, 913 (1970).] Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.” 176 N.E.2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska's opinion in *Simpson v. North Platte*, 292 N.W.2d 297, 301 (1980), where that court stated: “The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.” Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not occasioned by the construction sought to be permitted.” Id., at 302. Some form of the reasonable relationship test has been adopted in many other jurisdictions. See, e.g., Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965); Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex.1984); Call v. West Jordan, 606 P.2d 217, 220 (Utah 1979) (affirming use of the reasonable relation test).

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. [FN 8: Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U.S. at 836.]
We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Record, Doc. No. F, ch. 4, p. 4-29. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. App. to Pet. for Cert. G-16 to G-17. But the city demanded more – it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna, 444 U.S. at 176. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.

The city contends that the recreational easement along the greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in Nollan, petitioner's property is commercial in character and, therefore, her right to exclude others is compromised. Brief for Respondent 41, quoting United States v. Orito, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home"). The city maintains that "there is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store]." PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

Admittedly, petitioner wants to build a bigger store to attract members of the public to her property. She also wants, however, to be able to control the time and manner in which they enter. The recreational easement on the greenway is different in character from the exercise of state-protected rights of free expression and petition that we permitted in PruneYard. In PruneYard, we held that a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passers-by to sign their petitions. Id., at 85. We based our decision, in part, on the fact that the shopping center "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." Id., at 83. By contrast, the city wants to impose a permanent recreational easement upon petitioner's property that borders Fanno Creek. Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.
If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. . . . But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. . . . But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."

. . . No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

Justice STEVENS, with whom Justice BLACKMUN and Justice GINSBURG join, dissenting.

Certain propositions are not in dispute. The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion. The city has nevertheless agreed to grant Dolan's application if she will comply with two conditions, each of which admittedly will mitigate the adverse effects of her proposed development. The disputed question is whether the city has violated the Fourteenth Amendment to the Federal Constitution by refusing to allow Dolan's planned construction to proceed unless those conditions are met.

The Court is correct in concluding that the city may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application out-right. I also agree that state court decisions dealing with ordinances that govern municipal development plans provide useful guidance in a case of this kind. Yet the Court's description of the doctrinal underpinnings of its decision, the phrasing of its fledgling test of "rough proportionality," and the application of that test to this case run contrary to the traditional treatment of these cases and break considerable and unpropitious new ground.

The Court's assurances that its "rough proportionality" test leaves ample room for cities to pursue the "commendable task of land use planning," – even twice avowing that "no precise mathematical calculation is required," ante, at 391, 395 – are wanting given the result that test compels here. Under the Court's approach, a city must not only "quantify its findings," and make "individualized determinations" with respect to the nature and the extent of the relationship between the conditions
and the impact, but also demonstrate "proportionality." The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city. The heightened requirement the Court imposes on cities is even more unjustified when all the tools needed to resolve the questions presented by this case can be garnered from our existing case law.

Applying its new standard, the Court finds two defects in the city's case. First, while the record would adequately support a requirement that Dolan maintain the portion of the floodplain on her property as undeveloped open space, it does not support the additional requirement that the floodplain be dedicated to the city. Second, while the city adequately established the traffic increase that the proposed development would generate, it failed to quantify the offsetting decrease in automobile traffic that the bike path will produce. Even under the Court's new rule, both defects are, at most, nothing more than harmless error.

Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers "trampling along petitioner's floodplain," are more valuable than a useless parcel of vacant land.

The Court's rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path "could" offset some of the increased traffic flow that the larger store will generate, but the findings do not unequivocally state that it will do so, or tell us just how many cyclists will replace motorists. Predictions on such matters are inherently nothing more than estimates. Certainly the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur. If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.
JUSTICE SOUTER, dissenting.

I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally. Having thus assigned the burden, the Court concludes that the city loses based on one word ("could" instead of "would"), and despite the fact that this record shows the connection the Court looks for. Dolan has put forward no evidence that the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion. See, e. g., App. to Brief for Respondent A-5, quoting City of Tigard's Comprehensive Plan. *Nollan*, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits. As Members of this Court have said before, "the common zoning regulations requiring subdividers to . . . dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell* v. San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). The bicycle path permit condition is fundamentally no different from these.

Just as the *Penn Central* test is similar to the *Pike v. Bruce Church* test under the dormant commerce clause doctrine, as discussed at § 18.3.3 n.56, by placing the burden on the government to justify its action in *Dolan*, the Court's decision makes *Dolan* similar to the *Maine v Taylor* test under dormant commerce clause doctrine, discussed at § 13.3.1(D) nn.37-38. In both cases, the burden is shifted to the government to prove its regulation is "reasonable" because, in *Taylor*’s terms it is not a "clearly excessive" burden, or in *Dolan*’s terms, the government’s action is "roughly proportionate," and thus not "excessive," given the problems caused by the individual’s proposed action.

In *Koontz v. St. Johns River Water Management*, the Court held that monetary exactions as a condition of a land use permit, in this case requiring the owner to pay to make improvements on his or her local property to mitigate the environmental effects of his proposed development, must be tested under the more rigorous *Dolan* standard, rather than the *Penn Central* test for general regulatory and zoning laws. Monetary exactions, just as regulatory conditions requiring a party to grant easements in *Dolan v. Tigard*, triggered the *Dolan* test, Similar to *Dolan*, the four more liberal members of the Court dissented, and would have just applied *Penn Central* to the case.60


§ 18.4 Exceptions to Takings Clause Doctrine

Even when a taking is found, the Court has developed a few categories where the government does not have to pay compensation. In *Lucas v. South Carolina Coastal Council*,61 a statute, as applied, barred a property owner from erecting any permanent habitable structures on beachfront property. The Court held that this would be a taking if it deprived the owner of all economically beneficial uses of the property, unless the state's use restriction simply made explicit limits based upon: (1) nuisance law; or (2) other principles of the state's law of property already placed on land ownership when title was acquired.

Regarding this first exception, in *Miller v. Schoene*,62 the Court held that when government officials cut down cedar trees which had “cedar rust” disease to save an apple crop which might be harmed from the spread of the disease from trees on the owner’s land to other nearby trees, no compensation was required, despite it being a physical invasion of the owner’s property. The Court noted the traditional rule that when the government acts to rid property of being a public nuisance, no compensation need be paid.

Regarding the second exception, the Court noted in *Lucas* that where restrictions are already on use of property when an owner acquires the property, the owner cannot complain that those restrictions interfered with any investment-backed expectations, since the prohibition was in place when the property was acquired and thus “the proscribed use interests were not part of his title to begin with.”63

A third exception recognized by the Court where no compensation needs to be paid is for (3)(a) property taken or destroyed in time of war. As the Court noted in *United States v. Caltex, Inc.*,64 “[I]n wartime many losses must be attributed solely to the fortunes of war, and not the sovereign.” This is especially true, the Court noted, when the “property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy.”

On the other hand, as the Court noted in *Caltex*, “No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.”

63 505 U.S. at 1027. *See, e.g.*, Nies v. Town of Emerald Isle, 780 S.E.2d 187 (Ct. App. N.C. 2015) (dry sand portion of beach is encumbered by “public trust” doctrine, and thus regulation of driving across property does not implicate any property rights owner ever had in the beach-front property).
cases where property was appropriated for subsequent use, and not destroyed, just compensation has more often been provided.65 A similar doctrine (3)(b) applies under the “navigational servitude” doctrine, where the superior right of the federal government over “navigable waters” has traditionally meant an individual landowner’s regulatory taking claim concerning such waters effectively receives no consideration by the court.66

A fourth possible exception to a requirement to pay just compensation was discussed by Justice Kennedy, concurring in the judgment, in Lucas. Justice Kennedy agreed with the exceptions arising from nuisance law or existing state law, but also added an additional exception, that is, (4) no reasonable investment-backed expectation of ability to use the property in a particular way, based not only on the initial grant of title, but on later foreseeable regulatory initiatives, such as environmental concerns for a fragile land system.67 The liberal predisposition of Justices Ginsburg, Breyer, Sotomayor, and Kagan suggests they might agree with Justice Kennedy on this fourth exception to Takings Clause analysis. Thus, this fourth category of an exception to normal Takings Clause analysis might be adopted by the majority of the Supreme Court in the future.

In determining what property parcel to consider, the Court indicated in Murr v. Wisconsin, 137 S. Ct. 1933, 1943-48 (2017) (Gorsuch, J., not participating), that the test is a “functional” one, so that if two adjacent parcels of land are interrelated they can be considered together in terms of whether any economic viable use is left after government regulation, rather than following literal state law which would indicate that each separate parcel should be considered independently to determine viable use under Penn Central and Lucas analysis. Id. at 1950 (Roberts, C.J., joined by Thomas & Alito, JJ., dissenting) (state law should be followed). See generally Horne v. Department of Agriculture, 135 S. Ct. 2419 (2015) (per se takings rule for physical possession applies not only to real property, as in Loretto, but to personal property, in this case, raisins); Laurel Park Community, LLC v. City of Turnwater, 698 F.3d 1180 (9th Cir. 2012) (under Penn Central, city ordinance aimed at preserving availability of mobile home parks by limiting permitted alternative land uses, causing possible loss of up to 15% of property value, not a taking); Arkansas Game and Fish Commission v. United States, 133 S. Ct. 511 (2012) (temporary government-induced flooding must be tested under standard Penn Central doctrine, just as permanent flooding); National Association of Retired Federal Employees v. Horner, 633 F. Supp. 511 (D.D.C. 1986) (cost of living adjustments under Civil Service Retirement Act did not establish a property right in the scheduled adjustment), summarily aff’d, 479 U.S. 878 (1986).


67 Lucas, 505 U.S. at 1034-36 (Kennedy, J., concurring in the judgment).
PART VII: THE EQUAL PROTECTION CLAUSE

CHAPTER 19: MINIMUM RATIONALITY REVIEW

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§ 19.1 Introduction to Equal Protection Clause Doctrine

The Equal Protection Clause of § 1 of the 14th Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." By explicit text, this provision applies only to “State” action, i.e., the actions of states and their political subdivisions, cities and counties. The federal government is not limited by the text of the 14th Amendment. However, in 1954, the Court held in Bolling v. Sharpe,¹ that the Fifth Amendment's Due Process Clause, which does limit the federal government, has an Equal Protection "branch," so that the Equal Protection Clause of the 14th Amendment, which textually applies only to “States,” applies to the federal government through the Fifth Amendment’s Due Process Clause. To reach this result, the Court stated in Bolling that “discrimination may be so unjustifiable as to be violative of due process.”

In 1975, the Court held in Weinberger v. Wiesenfeld² that the "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." This has remained Court doctrine, despite occasional dicta to the contrary, as in 1976 in Hampton v. Mow Sun Wong,³ where the Court stated, "[T]he two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual state." The Court stated in 1995 in Adarand Constructors, Inc. v. Pena,⁴ “[E]qual protection obligations imposed by the Fifth and Fourteenth Amendments


³ 426 U.S. 88, 100 (1976).

[are] indistinguishable. . . . We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate [citing Hampton, which involved federal regulation of aliens] to detract from this general rule.” Thus, Equal Protection Clause principles apply today to any form of “state action,” whether federal, state, or local governmental action, or private action “fairly attributable” to the government, as addressed under the state action doctrine at § 15.1 n.4. As a matter of pleading, one pleads under the Equal Protection branch of the Fifth Amendment Due Process Clause for challenges to the federal government, and under the Equal Protection Clause of the 14th Amendment for challenges to state and local action.

By explicit text, the Equal Protection Clause applies to “any person.” Thus, it is not limited to “citizens.” Aliens are thus protected by the clause. Corporations, as well as partnerships or individual proprietorships, have also been held to be “persons” entitled to equal protection of the laws. The clause is also not limited to protecting only “groups” or “classes” of individuals from discrimination. The Court said in 2000 in Village of Willowbrook v. Olech, “[T]he purpose of the equal protection clause of the 14th Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” The Court explained that the plaintiff need not allege membership in a class that suffered discrimination. It said, “Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”

Despite the straightforward application of these terms in the Equal Protection Clause, determining what constitutes “equal protection of the laws” has been difficult. The term “equal protection” does not define itself. Logically, all laws, by drawing classifications between permitted and prohibited conduct, treat some persons differently than others – that is the nature of legislation. Thus, mere different treatment does not constitute a denial of equal protection of the laws, for every law treats some persons differently than others. However, as stated in one early case in 1897, Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150, 154 (1897), and cases cited therein. In 1886, the Court assumed that corporations were “persons” under the Equal Protection Clause in Santa Clara County v. Southern Pac. R. Co., 118 U.S. 394, 410-11 (1886), and the Court squarely held that two years later in Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189-90 (1888).

5 See Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150, 154 (1897), and cases cited therein. In 1886, the Court assumed that corporations were “persons” under the Equal Protection Clause in Santa Clara County v. Southern Pac. R. Co., 118 U.S. 394, 410-11 (1886), and the Court squarely held that two years later in Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189-90 (1888).

6 528 U.S. 562, 564 (2000). See generally Lauth v. McCollum, 424 F.3d 631, 632-34 (7th Cir. 2005) (Posner, J., opinion) (discussing difficulty of proving in “class of one” cases that action was motivated by illegitimate “animus” or was not conceivably “rationally related” to legitimate ends).

7 See generally Peter Westen, The Empty Idea of Equality, 85 Harv. L. Rev. 537 (1982) (discussing the need for some substantive theory to determine which kinds of unequal treatment are permissible versus which kinds of unequal treatment are not permissible).
& Santa Fe Railroad Co. v. Ellis, classifications in the law "must always rest on some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In applying this test, the Court stated in 1948 in Railway Express Agency, Inc. v. New York, “It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered.” Discussing the requirement of a “reasonable” relationship, the Court noted in 1992 in Nordlinger v. Hahn:

As a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” . . . Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

As initially applied during the formalist era, this rational basis test had some “teeth.” For example, in 1897, the clause was used to protect railroads against having to pay attorneys’ fees to successful plaintiffs in certain kinds of actions. The Court said in Gulf, Colorado & Santa Fe Railroad Co. v. Ellis that the railroads were being discriminated against and that classifications in the law "must always rest on some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." In F.S. Royster Guano Co. v. Virginia, the Court phrased the test as whether the classification rested on some ground of difference "having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The Court used this doctrine during the formalist era to rule unconstitutional many examples of "class" legislation, that is, laws that treated rich persons or corporations differently from poor persons or individual entrepreneurs. As the Court noted in Quaker City Cab Co. v. Pennsylvania, “The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary, but based on a real and
substantial difference having a reasonable relation to the subject of the particular legislation.’ . . . The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal Constitution.” Based on this observation, the Court invalidated in *Quaker City Cab* a taxing scheme that taxed corporately-owned cabs differently than those owned by individual entrepreneurs. A substantial number of statutes were similarly struck down that discriminated against corporations or made tax classifications not based on circumstances “peculiarly applicable to corporations, as are taxes on their capital stock or franchises.”14 Similar decisions striking down regulations on corporations were reached using a due process analysis,15 or a dormant commerce clause analysis.16

These decisions reflected the general predisposition of the conservative formalist-era Court, noted at § 6.1 n.1, to be protective of business interests. In this content, that meant the Court was a bulwark against what the Court perceived as “socialist” legislation. Even so, it was not always easy to predict when the Court would find that a classification was not reasonable. For example, the New York Milk Control Law, as it existed in the 1930s, allowed a milk dealer to sell to stores at one cent per quart lower than a fixed price if the dealer lacked a well-advertised trade name and had been in business prior to the effective date of the Act, April 10, 1933. The Court sustained the trade name provision, saying that the legislature might reasonably have thought that trade conditions justified the differential, which gave smaller, less well-advertised businesses a one cent price advantage in competition with larger, well-advertised businesses, like Borden’s.17 However, the Court struck down the requirement in the Act that the less well-advertized dealer had to have been in business by April 10, 1933, saying that it was arbitrary to deny the price benefit to newer businesses, and had no relation to the public welfare or prevention of monopoly.18

Because the Holmesian approach to judicial decisionmaking is characterized by deference to legislative and executive judgments, during the Holmesian era the Court became very deferential to legislative action. It reduced the level of equal protection review in economic cases to minimum rational review, as it did also for substantive due process review, discussed at § 17.1.3. Thus, a

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15 *See, e.g.*, Looney v. Crane Co., 245 U. S. 178, 187-89 (1917) (franchise tax and permit tax on corporation based on earnings out of the state violates due process), and cases cited therein.

16 *See, e.g.*, Sioux Remedy Co. v. Cope, 235 U.S. 197, 201-05 (1914) (requirement that a corporation file articles of incorporation, appoint a resident agent for service of process, and pay a $25 filing fee in order to do business in a state violates dormant commerce clause principles as an unlawful burden on interstate commerce), and cases cited therein.

17 Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 262-63 (1936).

challenger had the burden of proving that a classification was not rationally related to any legitimate goal that the legislature conceivably intended to pursue. Regarding due process, that was made clear in 1938, by the decision in United States v. Carolene Products Co,\textsuperscript{19} excerpted at § 17.3. There the Court said that when a legislative judgment is drawn in question, the judicial inquiry must be restricted to "whether any state of facts either known or which could reasonably be assumed affords support for it." The same approach began to be used in equal protection review of economic laws, even in cases where later instrumentalist courts decided some higher standard of review would be appropriate based on invidious discrimination.\textsuperscript{20}

Minimum rational review, with great deference given to legislative decisions, has remained in place during the instrumentalist and post-instrumentalists eras with respect to standard social and economic legislation not involving invidious discrimination. Under this approach, most laws are upheld. For example, in Dandridge v. Williams,\textsuperscript{21} a case involving a limit on the amount of money a family can receive under the Aid to Families with Dependent Children program, no matter how many children are in the family, the Court noted, "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. . . . The [minimum rationality review standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." In Vance v. Bradley,\textsuperscript{22} the Court upheld a federal law requiring retirement at age 60 of federal employees in the Foreign Service retirement and disability system, but not those in the Civil Service retirement and disability system.

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\textsuperscript{19} 304 U.S. 144, 154 (1938).

\textsuperscript{20} See, e.g., Koch v. Board of River Port Pilot Commissioners for the Port of New Orleans, 330 U.S. 552, 556-64 (1947) (rule that even otherwise qualified pilots must serve a 6-month apprenticeship to pilot ship to and through the Port of New Orleans constitutional, even where existing pilots had great discretion upon whom to take as apprentices, and they overwhelmingly favored relatives or friends of incumbents for the apprenticeships) (Rutledge, J., joined by Reed, Douglas & Murphy, JJ., dissenting) (viewing the case as similar to racial or religious discrimination which would trigger strict scrutiny under Yick Wo v. Hopkins, 118 U.S. 356 (1886), excerpted at § 20.4); Goesaert v. Cleary, 335 U.S. 464, 465-67 (1948) (Michigan law upheld requiring a license for bartenders serving liquor in cities having a population of 50,000 or more, but providing "no female may be so licensed unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment," on the grounds that "Michigan evidently believes that the oversight assured through ownership of a bar by the barmaid's husband or father minimizes hazards that may confront a barmaid without such protective oversight") (Rutledge, J., joined by Douglas and Murphy, JJ., dissenting) (viewing the case as invidious discrimination that should trigger higher than minimum rationality review, which it would today under the intermediate standard of review applicable for gender discrimination adopted in Craig v. Boren, 429 U.S. 190 (1976), excerpted at § 22.2).


\textsuperscript{22} 440 U.S. 93, 104-09 (1979).
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In 1957, the Court did hold in *Morey v. Doud*\(^2\) that a statute imposing licensing and financial standards on sellers and issuers of money orders unconstitutionally exempted the American Express Company. However, the Court overruled *Morey v. Doud* in 1976 in *New Orleans v. Dukes*.\(^2\) *Dukes* involved a ban in the New Orleans French Quarter on selling foodstuffs from pushcarts, with an exemption for vendors who had been operating for eight years. The exemption was upheld, with the Court explaining that *Morey* was a needlessly intrusive judicial infringement on a state's legislative powers to make exemptions for legitimate, rational reasons – here that some vendors had become part of the charm of the area. Indeed, clarifying the language from *Carolene Products* about deference to the legislature, the Court noted in 1980 in *United States Railroad Retirement Board v. Fritz*,\(^2\) excerpted at § 19.2, that where there is a conceivable reason for governmental action, that reason can be used to support the action, it being constitutionally irrelevant whether the reasoning in fact underlay the legislative decision.

Today's post-instrumentalist Supreme Court, influenced by the natural law tradition which gives great weight to precedent, as noted at § 2.4.6 n.86, continues to follow minimum rational review for standard social and economic legislation. The Court has been clear about how deferential to the government minimum rational review is in practice. In 1993, the Court stated in *Heller v. Doe*:

> A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" . . . . [On the other hand,] even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.\(^2\)

To determine whether a statute “rationally furthers a legitimate state interest,” the Court considers three things. The first inquiry is what government ends, or interests, support the statute’s constitutionality. Under rational basis review, the government ends supported by the statute must be “legitimate.” Legitimate ends are those within the usual “police power” of the state, that is, they

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\(^{23}\) 354 U.S. 457 (1957).

\(^{24}\) 427 U.S. 297 (1976).

\(^{25}\) 449 U.S. 166, 174-76 (1980).

\(^{26}\) 509 U.S. 312, 320-21 (1993), and cases cited therein.
involve the health, safety, or general welfare of the people, broadly defined. In practice, as noted in *Heller v. Doe*, the Court presumes the legislature is motivated by legitimate interests, leaving the burden on the challenger to prove that the legislature was motivated by illegitimate interests.  

The history surrounding adoption of the Equal Protection Clause indicates that one clear purpose of the clause was to outlaw the “Black Codes” that had proliferated in many Southern states during the post-Civil War period after slavery had been outlawed by the 13th Amendment. The Black Codes imposed severe legal restrictions on newly freed African-Americans. The Codes typically prohibited blacks from voting or holding office, serving on juries, or marrying whites. The Codes gave employers contract rights and methods of enforcing contracts against black laborers that were not available in contracts with white laborers. Further, the Codes gave landowners methods of disciplining black tenants and field hands that they were not legally authorized to use against white tenants and field hands. The Black Codes authorized employers and landowners, as well as ordinary whites organized into patrols, to enforce an informal, customary system of controls that restricted blacks’ freedom to move from place to place through discriminatory application of vagrancy laws. In addition, blacks in the South were denied access to local systems of civil and criminal justice when they sought to redress violations of their rights and crimes committed against them.

In response, Congress enacted the Civil Rights Act of 1866, which declared that all persons born in the United States were "citizens of the United States" and listed their rights, including the right to own property, the right to enter into contracts without racial discrimination, and the right to be safe from corrupt law enforcement practices. One purpose of the 14th Amendment was to make it clear that the Civil Rights Act of 1866 was constitutional. Given this history, the Court has always held that a bare desire to discriminate on racial grounds constitutes an illegitimate governmental interest, as in the 1886 case of *Yick Wo v. Hopkins*. In the post-1954 instrumentalist and modern natural law eras, the Court has also held that “if the constitutional conception of ‘equal protection of the


30 118 U.S. 356, 373-74 (1886).
In a sequence of cases, the Court has applied this principle to both federal and state action involving discrimination against “hippies” wishing to live in a commune; prejudice against persons who enter into an interracial marriage; prejudice against the mentally impaired; and animus against individuals based upon their sexual orientation. Following the formalist focus on history and the Holmesian focus on legislative and executive practice, formalist and Holmesian Justices today still tend to adopt the view that legislation reflecting historical or traditional attitudes against some group can constitute a legitimate government interest for regulation since they reflect the views of the majority which should be followed in a democracy, as in the dissent in Romer v. Evans,

Once it is determined that the statute is advancing a “legitimate state interest,” the next inquiry turns to whether the statute “rationally furthers” that interest. This inquiry focuses on whether the statute’s means are rationally related to furthering the statute’s legitimate ends. As with the presumption that the statute’s ends are legitimate, in practice the Court presumes the statute’s means are “rationally related” to furthering its ends, leaving the burden on the challenger to prove that no rational relationship exists. In addition, applying this rational review test, the Court grants substantial deference to legislative judgment regarding the rationality of the legislative classification because, as the Court has often observed, the judiciary does not sit “as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”

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31 United States Dep’t of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

32 Id. at 534 (“prevent[ing] so-called ‘hippie’ and ‘hippie communes’ from participating in the food stamp program” not legitimate if based upon a “purpose to discriminate against hippies”).


34 City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985) (prejudice against the mentally impaired held to be an illegitimate governmental interest).


36 Id. at 640-43 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting). See also Lawrence v. Texas, 539 U.S. 558, 589-91 (Scalia, joined by Rehnquist, C.J. & Thomas, J., dissenting) (law banning homosexual sodomy should be upheld as constitutional based on traditional moral disapproval of homosexual conduct). Lawrence is excerpted at § 27.1.1.


38 Id. at 319, citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).
Under the Court’s doctrine, this “rational relationship” inquiry has two parts. The first aspect focuses on the statute’s “underinclusiveness” — that is, to what extent does the statute fail to regulate all individuals who are part of a problem. A statute may be held to be “irrationally underinclusive” if that statute fails to regulate certain individuals who are an equal part, or perhaps even a greater part, of creating some problem as are individuals whom the statute does regulate, unless there is some rational explanation for why the persons who are equally or a greater part of some problem are not being equally regulated, such as administrative cost considerations support regulating the lesser part first at low cost (getting a bigger bang for the buck), or the greater problem represents a different category (“genus”) of thing to regulate (and thus not part of the same regulatory initiative). A statute that does not regulate all persons who are part of some problem, but which regulates the greater part of the problem first, will be held to be “rational” because, as the Court stated in Railway Express Agency, Inc. v. New York,40 excerpted at § 19.3, “[e]qual protection doesn’t require that all evils of the same genus be eliminated or none at all.” The legislature can adopt a step-by-step approach, as long as each step is rational in terms of which part is regulated first.

The second part of the “rationally furthers” or “rational relationship” inquiry focuses on the statute’s “overinclusiveness” — that is, the extent to which the statute imposes burdens on individuals who are not the focus of the statute’s regulation. Ideally, of course, a statute should only regulate those persons who are part of creating some problem, and not regulate innocent persons. However, as the Court has noted, “If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”41 On the other hand, a statute that burdens innocent persons for no rational reason will be held to be irrationally overinclusive. As the Court noted in New York City Transit Authority v. Beazer, excerpted at § 19.4, “[L]egislative classsifications are valid unless they bear no rational relationship to the State’s objectives.”42 The question is thus whether Congress achieved its purpose by burdening innocent individuals in a patently arbitrary or irrational way.

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39 Laurence H. Tribe, American Constitutional Law § 16.3, at 1442-43 (2d ed. 1988). See also Erwin Chemerinsky, Constitutional Law: Principles and Policies 695 (4th ed. 2011) (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . [I]t is very rare for the . . . Court to find that a law fails . . . .”).


In addition to minimum rationality review, the Supreme Court has explicitly adopted two other levels of review under the Equal Protection Clause. As discussed at § 19.1 nn.27-42, under minimum rational review, the legislation must (1) advance legitimate government ends, (2) be rationally related to advancing these ends (not irrationally underinclusive), and (3) not impose irrational burdens on individuals (not irrationally overinclusive). As discussed at § 20.1 nn.12-15, 22-24, under intermediate review, the legislation must (1) advance important or substantial government ends, (2) be substantially related to advancing these ends, and (3) not be substantially more burdensome than necessary to advance these ends. As discussed at § 20.1 nn.2-11, 16-21, 25-32, under strict scrutiny, the statute must (1) advance compelling governmental ends, (2) be directly related to advancing these ends, and (3) be the least restrictive effective means to advance the ends.

As indicated in the cases addressed in Chapters 20-22, under both intermediate review and strict scrutiny, the government bears the burden of justifying its action, rather than the challenger bearing the burden of proving unconstitutionality under minimum rationality review. While “any conceivable interest” can be used to justify a statute at minimum rationality review, as noted at § 19.1 n.25, at intermediate review the government can only use “plausible” or “actual” government purposes to justify its action, as discussed at § 22.3 nn.31-36. At strict scrutiny, the government can only use “actual” government purposes, as discussed at § 20.1 n.28. As indicated in United States Railroad Retirement Bd. v. Fritz, excerpted at § 19.2, instrumentalist Justices have occasionally tried to impose a higher level of only permitting “plausible” or “actual” purposes to be used at minimum rationality review, but such an approach has little, if any, support on the Court today.

In deciding whether to adopt minimum rationality review, intermediate review, or strict scrutiny in any particular case, the Court uses a myriad of factors. From the Court’s opinions, nine separate factors can be identified as potentially relevant in determining what standard of review to apply. The first of these factors, relied upon by all four decisionmaking styles, is: (1) whether arguments of text, context, and history suggest that the classification is one the framers and ratifiers would have thought deserves heightened scrutiny. The Court has said, “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution.” With regard to the text and history of the Equal Protection Clause, the Court noted as long ago as 1886 that the provisions of the 14th Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality." Thus, cases involving race, ethnicity, or national origin traditionally trigger the highest kind of Equal Protection Clause review – strict scrutiny.

Two other factors appear more prominently in formalist opinions, as they reflect the formalist emphasis on the task of the judge to follow positive law, not make law, and emphasis on clear and predictable rules. These two factors are: (2) whether a fundamental right is involved, particularly

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a right that appears to be within the specific prohibitions of the Constitution, such as those of the first ten Amendments\textsuperscript{46}; and (3) would a Pandora’s Box be opened up where heightened scrutiny in the case would lead to demands for heightened scrutiny in other similarly situated cases, creating more litigation and unpredictability in the law.\textsuperscript{47}

Two other factors appear more prominently in Holmesian opinions. These relate to the Holmesian preference to defer to legislative and executive decisionmaking, where possible. These factors ask: (4) whether a deficiency exists in the “political process which can ordinarily be expected to bring about repeal of undesirable legislation”\textsuperscript{48}; and (5) whether the statute is “directed against particular religious, national, or racial minorities,” or reflects “prejudice against discrete and insular minorities” who, because they are discrete and insular, cannot be expected to protect their interests adequately in the legislative process.\textsuperscript{49} Where such a concern exists with the political process, even Holmesian judges are not prepared to exercise minimum rationality review deference.

Two other factors appear more prominently in natural law opinions. These reflect the basic natural law concern that individuals should be held responsible for their own actions, but that individuals should not be punished for things over which they have no control. These two factors are: (6) whether the classification burdens an immutable characteristic, like race or gender\textsuperscript{50}; and (7) whether the classification, whether immutable or not, burdens an individual for something not the product of the individual’s choice, like status as an illegitimate child or being the child of parents who are illegally in the United States.\textsuperscript{51}

\textsuperscript{46} See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race. . . .[S]trict scrutiny of the classification which a State makes in a sterilization law is essential.”) United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within specific prohibitions of the Constitution, such as those of the first ten amendments.”).

\textsuperscript{47} See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 445-46 (1985) (“[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect, it would be difficult to find a principled way to distinguish a variety of other groups . . . . One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.”).

\textsuperscript{48} See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

\textsuperscript{49} Id.

\textsuperscript{50} See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”)

Two final factors appear more prominently in instrumentalist opinions. They reflect the instrumentalist focus on scrutinizing more carefully burdens that the judge feels are the product of wrong-headed thinking and on achieving sound social policy. These factors are: (8) whether the classification is viewed by the judge as a product of false stereotypes about individuals, particularly if based on outmoded notions of the relative capabilities of men and women or part of an historical pattern of such discrimination; and (9) to what extent the judges are competent to make the substantive decisions required at heightened scrutiny which involve scrutinizing legislative judgment as to whether the ends are sufficiently important or compelling, the means are sufficiently narrowly tailored or necessary, and whether any alternatives to the legislation would be effective or not. Not surprisingly, instrumentalist judges, with their greater willingness to consider social policy in their decisionmaking, are often more willing to conclude they are competent to make the kind of substantive decisions necessary at heightened scrutiny. Formalist, Holmesian, and natural law judges are less confident about this matter, particularly Holmesian judges with their greater preference for deference to legislative and executive action.

In terms of the two categories under *Nordlinger v. Hahn*, cited above at § 19.1 n.10, that trigger heightened scrutiny – fundamental rights and suspect classifications – factor (2) focuses directly on the question of whether a fundamental right exists. Factors (4) - (8) focus on whether a suspect class (triggering strict scrutiny), or quasi-suspect class (triggering intermediate review) is involved. Factor (1) on the framers and ratifiers’ intent, and factors (3) and (9) on concerns with a Pandora’s Box and judicial competence to scrutinize legislative judgment, apply in both cases of fundamental rights and suspect, or quasi-suspect, classifications.

This issue of what level of review to adopt will be a main focus of Chapter 23, which addresses the appropriate standard of review to use in cases as diverse as regulation of aliens, laws discriminating against illegitimate children, laws involving age discrimination, and classifications involving wealth, physical or mental disabilities, or sexual orientation. Cases involving minimum rationality review are presented below. Cases involving race discrimination, which today always trigger strict scrutiny, are addressed in Chapters 20-21. Cases involving gender discrimination, which today always trigger intermediate review, are addressed in Chapter 22.

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52 See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684 (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes.”)

53 See, e.g, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443 (1985) (“Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt the predicate for such judicial oversight is present where the classification deals with mental retardation).

54 *Id.* at 443 (majority opinion of formalist, Holmesian, and natural law Justices unwilling to apply heightened scrutiny in *Cleburne*, in an opinion written by Holmesian Justice White; instrumentalist dissent by Justices Brennan, Marshall, and Blackmun more willing to scrutinize legislative judgment in the case).
§ 19.2  Legitimate Interests under Minimum Rationality Review

United States Railroad Retirement Board v. Fritz
449 U.S. 166 (1980)

Justice REHNQUIST delivered the opinion of the Court.


The 1974 Act fundamentally restructured the railroad retirement system. The Act's predecessor statute, adopted in 1937, provided a system of retirement and disability benefits for persons who pursued careers in the railroad industry. Under that statute, a person who worked for both railroad and nonrailroad employers and who qualified for railroad retirement benefits and social security benefits, 42 U.S.C. § 401 et seq., received retirement benefits under both systems and an accompanying “windfall” benefit. The legislative history of the 1974 Act shows that the payment of windfall benefits threatened the railroad retirement system with bankruptcy by the year 1981. Congress therefore determined to place the system on a “sound financial basis” by eliminating future accruals of those benefits. Congress also enacted various transitional provisions, including a grandfather provision, § 231b(h), which expressly preserved windfall benefits for some classes of employees.

In restructuring the Railroad Retirement Act in 1974, Congress divided employees into various groups. First, those employees who lacked the requisite 10 years of railroad employment to qualify for railroad retirement benefits as of January 1, 1975, the changeover date, would have their retirement benefits computed under the new system and would not receive any windfall benefit. Second, those individuals already retired and already receiving dual benefits as of the changeover date would have their benefits computed under the old system and would continue to receive a windfall benefit. Third, those employees who had qualified for both railroad and social security benefits as of the changeover date, but who had not yet retired as of that date (and thus were not yet receiving dual benefits), were entitled to windfall benefits if they had (1) performed some railroad service in 1974 or (2) had a “current connection” with the railroad industry as of December 31, 1974, or (3) completed 25 years of railroad service as of December 31, 1974. 45 U.S.C. § 231b(h)(1). Fourth, those employees who had qualified for railroad benefits as of the changeover date, but lacked a current connection with the railroad industry in 1974 and lacked 25 years of railroad employment, could obtain a lesser amount of windfall benefit if they had qualified for social security benefits as of the year (prior to 1975) they left railroad employment. 45 U.S.C. § 231b(h)(2).

Appellee and others filed this class action in the United States District Court for the Southern District of Indiana, seeking a declaratory judgment that 45 U.S.C. § 231b(h) is unconstitutional under the [Ed.: Equal Protection component of the] Due Process Clause of the Fifth Amendment
because it irrationally distinguishes between classes of annuitants. The District Court eventually certified a class of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were permanently insured under the Social Security Act as of December 31, 1974, but who were not eligible to receive any “windfall component” because they had left the railroad industry before 1974, had no “current connection” with it at the end of 1974, and had less than 25 years of railroad service. Appellee contended below that it was irrational for Congress to have drawn a distinction between employees who had more than 10 years but less than 25 years of railroad employment simply on the basis of whether they had a “current connection” with the railroad industry as of the changeover date or as of the date of retirement.

The District Court agreed with appellee that a differentiation based solely on whether an employee was “active” in the railroad business as of 1974 was not “rationally related” to the congressional purposes of insuring the solvency of the railroad retirement system and protecting vested benefits. We disagree and reverse.

[T]he plain language of § 231b(h) marks the beginning and end of our inquiry. [FN10: This opinion and Justice Brennan's dissent cite a number of equal protection cases . . . . The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in [any of the cases] referred to in this opinion and in the dissenting opinion. But like our predecessors and our successors, we are obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires and in so doing we have no hesitation in asserting, contrary to the dissent, that where social or economic regulations are involved, Dandridge v. Williams, 397 U.S. 471 (1970), and Jefferson v. Hackney, 406 U.S. 535 (1972), together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.] There Congress determined that some of those who in the past received full windfall benefits would not continue to do so. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits. New Orleans v. Dukes, supra, at 305.

The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way. The classification here is not arbitrary, says appellant, because it is an attempt to protect the relative equities of employees and to provide benefits to career railroad employees. Congress fully protected, for example, the expectations of those employees who had already retired and those unretired employees who had 25 years of railroad employment. Conversely, Congress denied all windfall benefits to those employees who lacked 10 years of railroad employment. Congress additionally provided windfall benefits, in lesser amount, to those employees with 10 years’ railroad employment who had qualified for social security benefits at the time they had left railroad employment, regardless of a current connection with the industry in 1974 or on their retirement date.
Thus, the only eligible former railroad employees denied full windfall benefits are those, like appellee, who had no statutory entitlement to dual benefits at the time they left the railroad industry, but thereafter became eligible for dual benefits when they subsequently qualified for social security benefits. Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits. Furthermore, the “current connection” test is not a patently arbitrary means for determining which employees are “career railroaders,” particularly since the test has been used by Congress elsewhere as an eligibility requirement for retirement benefits. Congress could assume that those who had a current connection with the railroad industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed. Hisquierdo v. Hisquierdo, 439 U.S., at 573.

It is, of course, “constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,” Flemming v. Nestor, 363 U.S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The “task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,” Mathews v. Diaz, 426 U.S. 67, 83-84 (1976), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Finally, we disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted. To be sure, appellee lost a political battle in which he had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum. What we have said is enough to dispose of the claims that Congress not only failed to accept appellee's argument as to restructuring in toto, but that such failure denied him equal protection of the laws guaranteed by the Fifth Amendment.

For the foregoing reasons, the judgment of the District Court is reversed.

Justice STEVENS, concurring in the judgment.

In my opinion Justice Brennan's criticism of the Court's approach to this case merits a more thoughtful response than that contained in footnote 10 [of the Court’s opinion]. Justice Brennan correctly points out that if the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any “conceivable basis” for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do. Justice Brennan is also correct in
reminding us that even though the statute is an example of “social and economic legislation,” the challenge here is mounted by individuals whose legitimate expectations of receiving a fixed retirement income are being frustrated by, in effect, a breach of a solemn commitment by their Government. When Congress deprives a small class of persons of vested rights that are protected – and, indeed, even enhanced – for others who are in a similar though not identical position, I believe the Constitution requires something more than merely a “conceivable” or a “plausible” explanation for the unequal treatment.

I do not, however, share Justice Brennan's conclusion that every statutory classification must further an objective that can be confidently identified as the “actual purpose” of the legislature. Actual purpose is sometimes unknown. Moreover, undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State. I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.

In this case we need not look beyond the actual purpose of the legislature. As is often true, this legislation is the product of multiple and somewhat inconsistent purposes that led to certain compromises. One purpose was to eliminate in the future the benefit that is described by the Court as a “windfall benefit” and by Justice Brennan as an “earned dual benefit.” That aim was incident to the broader objective of protecting the solvency of the entire railroad retirement program. Two purposes that conflicted somewhat with this broad objective were the purposes of preserving those benefits that had already vested and of increasing the level of payments to beneficiaries whose rights were not otherwise to be changed. As Justice Brennan emphasizes, Congress originally intended to protect all vested benefits, but it ultimately sacrificed some benefits in the interest of achieving other objectives.

Given these conflicting purposes, I believe the decisive questions are (1) whether Congress can rationally reduce the vested benefits of some employees to improve the solvency of the entire program while simultaneously increasing the benefits of others; and (2) whether, in deciding which vested benefits to reduce, Congress may favor annuitants whose railroad service was more recent than that of disfavored annuitants who had an equal or greater quantum of employment.

My answer to both questions is in the affirmative. The congressional purpose to eliminate dual benefits is unquestionably legitimate; that legitimacy is not undermined by the adjustment in the level of remaining benefits in response to inflation in the economy. As for the second question, some hardship – in the form of frustrated long-term expectations – must inevitably result from any reduction in vested benefits. Arguably, therefore, Congress had a duty – and surely it had the right to decide – to eliminate no more vested benefits than necessary to achieve its fiscal purpose. Having made that decision, any distinction it chose within the class of vested beneficiaries would involve a difference of degree rather than a difference in entitlement. I am satisfied that a distinction based
upon currency of railroad employment represents an impartial method of identifying that sort of difference. Because retirement plans frequently provide greater benefits for recent retirees than for those who retired years ago – and thus give a greater reward for recent service than for past service of equal duration – the basis for the statutory discrimination is supported by relevant precedent. It follows, in my judgment, that the timing of the employees’ railroad service is a “reasonable basis” for the classification as that term is used in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, and Dandridge v. Williams, 397 U.S. 471, as well as a “ground of difference having a fair and substantial relation to the object of the legislation,” as those words are used in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412.

Accordingly, I concur in the judgment.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Appellee Gerhard Fritz represents a class of retired former railroad employees who were statutorily entitled to Railroad Retirement and Social Security benefits, including an overlap herein called the “earned dual benefit,” until enactment of the Railroad Retirement Act of 1974, which divested them of their entitlement to the earned dual benefit. The Act did not affect the entitlements of other railroad employees with equal service in railroad and nonrailroad jobs, who can be distinguished from appellee class only because they worked at least one day for, or retained a “current connection” with, a railroad in 1974.

The only question in this case is whether the equal protection component of the Fifth Amendment bars Congress from allocating pension benefits in this manner. The answer to this question turns in large part on the way in which the strictures of equal protection are conceived by this Court. See Morey v. Doud, 354 U.S. 457, 472 (1957) (Frankfurter, J., dissenting). The parties agree that the legal standard applicable to this case is the “rational basis” test. The District Court applied this standard below, see Conclusion of Law No. 7, reprinted at App. to Juris. Statement 28a. The Court today purports to apply this standard, but in actuality fails to scrutinize the challenged classification in the manner established by our governing precedents. I suggest that the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review.

The Court today avoids the conclusion that § 231b(h) must be invalidated by deviating in three ways from traditional rational-basis analysis. First, the Court adopts a tautological approach to statutory purpose, thereby avoiding the necessity for evaluating the relationship between the challenged classification and the legislative purpose. Second, it disregards the actual stated purpose of Congress in favor of a justification which was never suggested by any Representative or Senator, and which in fact conflicts with the stated congressional purpose. Third, it upholds the classification without any analysis of its rational relationship to the identified purpose.

The Court states that “the plain language of [45 U.S.C.] § 231b(h) marks the beginning and end of our inquiry.” This statement is strange indeed, for the “plain language” of the statute can tell us only what the classification is; it can tell us nothing about the purpose of the classification, let alone the
relationship between the classification and that purpose. Since § 231b(h) deprives the members of appellee class of their vested earned dual benefits, the Court apparently assumes that Congress must have intended that result. But by presuming purpose from result, the Court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose. But equal protection scrutiny under the rational-basis test requires the courts first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history, and second to analyze whether the challenged classification rationally furthers achievement of those objectives. The Court's tautological approach will not suffice.

The Court analyzes the rationality of § 231b(h) in terms of a justification suggested by Government attorneys, but never adopted by Congress. The Court states that it is “constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.” Ante, at 461 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960). In fact, however, equal protection analysis has evolved substantially on this question since Flemming was decided. Over the past 10 years, this Court has frequently recognized that the actual purposes of Congress, rather than the post hoc justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test. In Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975), we said: “This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.” (Citing cases.)

Thus, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973), this Court stated that a challenged classification will pass muster under “rational basis” scrutiny only if it “rationally furthers some legitimate, articulated state purpose” (emphasis added), and in Massachusetts Board of Retirement v. Murgia, 427 U.S., at 314, we stated that such a classification will be sustained only if it “rationally furthers the purpose identified by the State.” (Emphasis added.) Moreover, in Johnson v. Robison, 415 U.S., at 381-382, we upheld a classification on the finding that “[t]hese quantitative and qualitative distinctions, expressly recognized by Congress, form a rational basis for Congress' classification. . . .” (Emphasis added.) See also Califano v. Goldfarb, 430 U.S. 199, 212-213 (1977).

From these cases and others it is clear that this Court will no longer sustain a challenged classification under the rational-basis test merely because Government attorneys can suggest a “conceivable basis” upon which it might be thought rational. The standard we have applied is properly deferential to the Legislative Branch: where Congress has articulated a legitimate governmental objective, and the challenged classification rationally furthers that objective, we must sustain the provision. In other cases, however, the courts must probe more deeply. Where Congress has expressly stated the purpose of a piece of legislation, but where the challenged classification is either irrelevant to or counter to that purpose, we must view any post hoc justifications proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an actual legitimate governmental purpose.
The Court argues that Congress chose to discriminate against appellee for reasons of equity, stating that “Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits. *Ante*, at 461. This statement turns Congress' assessment of the equities on its head. As I have shown, Congress expressed the view that it would be inequitable to deprive any retirees of any portion of the benefits they had been promised and that they had earned under prior law. See also H.R. No.93-1345, pp. 4, 11 (1974); S. Rep. No.93-1163, pp. 4, 11 (1974); 120 Cong. Rec. 35613 (1974) (statement of Rep. Hudnut); *id.*, at 35614 (statement of Rep. Shuster); *id.*, at 35615 (statement of Rep. Morgan). The Court is unable to cite even one statement in the legislative history by a Representative or Senator that makes the equitable judgment it imputes to Congress. In the entire legislative history of the Act, the only persons to state that the equities justified eliminating appellee's earned dual benefits were representatives of railroad management and labor, whose self-serving interest in bringing about this result destroys any basis for attaching weight to their statements.

Of course, a misstatement or several misstatements by witnesses before Congress would not ordinarily lead us to conclude that Congress misapprehended what it was doing. In this instance, however, where complex legislation was drafted by outside parties and Congress relied on them to explain it, where the misstatements are frequent and unrebutted, and where no Member of Congress can be found to have stated the effect of the classification correctly, we are entitled to suspect that Congress may have been misled. As the District Court found: “At no time during the hearings did Congress even give a hint that it understood that the bill by its language eliminated an earned benefit of plaintiff’s class.” Finding of Fact No. 63, reprinted at App. to Juris. Statement 22a.

Therefore, I do not think that this classification was rationally related to an *actual* governmental purpose.

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*Romer v. Evans*

517 U.S. 620 (1996)

Justice KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as “Amendment 2,” its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in
various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. Denver Rev. Municipal Code, Art. IV, §§ 28-91 to 28-116 (1991); Aspen Municipal Code § 13-98 (1977); Boulder Rev. Code §§ 12-1-1 to 12-1-11 (1987). What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. See Boulder Rev. Code § 12–1–1 (defining “sexual orientation” as “the choice of sexual partners, i.e., bisexual, homosexual or heterosexual”); Denver Rev. Municipal Code, Art. IV, § 28-92 (defining “sexual orientation” as “[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality”). Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Colo. Const., Art. II, § 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

“No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The state court, deeming it unnecessary to determine the full extent of the amendment's reach, found it invalid even on a modest reading of its implications. The critical discussion of the amendment, set out in Evans I, is as follows:
The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. See Aspen, Colo., Mun. Code § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code §§ 12-1-2 to -4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, §§ 28-91 to -116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination for “all state employees, classified and exempt” on the basis of sexual orientation); Colorado Insurance Code, § 10-3-1104, 4A C.R.S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.

The “ultimate effect” of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. 854 P.2d, at 1284-1285, and n.26.

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.


Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of “public accommodation.” They include “any place of business engaged in any sales to the general public.
and any place that offers services, facilities, privileges, or advantages to the general public or that
receives financial support through solicitation of the general public or through governmental subsidy
of any kind.” Boulder Rev. Code § 12-1-1(j) (1987). The Denver ordinance is of similar breadth,
applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common
 carriers, travel and insurance agencies, and “shops and stores dealing with goods or services of any

Amendment 2 bars homosexuals from securing protection against the injuries that these
public-accommodations laws address. That in itself is a severe consequence, but there is more.
Amendment 2, in addition, nullifies specific legal protections for this targeted class in all
transactions in housing, sale of real estate, insurance, health and welfare services, private education,
and employment. See, e.g., Aspen Municipal Code §§ 13-98(b), (c) (1977); Boulder Rev. Code §§

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or
policies providing specific protection for gays or lesbians from discrimination by every level of
Colorado government. The State Supreme Court cited two examples of protections in the
governmental sphere that are now rescinded and may not be reintroduced. The first is Colorado
Executive Order D0035 (1990), which forbids employment discrimination against “all state
employees, classified and exempt’ on the basis of sexual orientation.” 854 P.2d, at 1284. Also
repealed, and now forbidden, are “various provisions prohibiting discrimination based on sexual
orientation at state colleges.” Id., at 1284, 1285. The repeal of these measures and the prohibition
against their future reenactment demonstrate that Amendment 2 has the same force and effect in
Colorado's governmental sector as it does elsewhere and that it applies to policies as well as ordinary
legislation.

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians.
It is a fair, if not necessary, inference from the broad language of the amendment that it deprives
gays and lesbians even of the protection of general laws and policies that prohibit arbitrary
(agency action subject to judicial review under arbitrary and capricious standard); § 18-8-405
(making it a criminal offense for a public servant knowingly, arbitrarily, or capriciously to refrain
from performing a duty imposed on him by law); § 10-3-1104(1)(f) (prohibiting “unfair
discrimination” in insurance); 4 Colo. Code of Regulations 801-1, Policy 11-1 (1983) (prohibiting
discrimination in state employment on grounds of specified traits or “other non-merit factor”). At
some point in the systematic administration of these laws, an official must determine whether
homosexuality is an arbitrary and, thus, forbidden basis for decision. Yet a decision to that effect
would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so
would appear to be no more valid under Amendment 2 than the specific prohibitions against
discrimination the state court held invalid.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws
must coexist with the practical necessity that most legislation classifies for one purpose or another,
with resulting disadvantage to various groups or persons. Personnel Administrator of Mass. v.
Feeney, 442 U.S. 256, 271-272 (1979); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e.g., Heller v. Doe, 509 U.S. 312, 319-320 (1993).

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. See New Orleans v. Dukes, 427 U.S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (assumed health concerns justified law favoring optometrists over opticians); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); Kotch v. Board of River Port Pilot Comm'r's for Port of New Orleans, 330 U.S. 552 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. See Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect”).

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928).
The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. “[C]lass legislation...[is] obnoxious to the prohibitions of the Fourteenth Amendment...” Civil Rights Cases, 109 U.S., at 24.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a “‘bare... desire to harm’” homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick, 478 U.S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that “animosity” toward homosexuality is evil. I vigorously dissent.

Let me first discuss [that part] of the Court's opinion, its longest section, which is devoted to rejecting the State's arguments that Amendment 2 “puts gays and lesbians in the same position as all other persons,” and “does no more than deny homosexuals special rights.” The Court concludes that this reading of Amendment 2's language is “implausible” under the “authoritative construction” given Amendment 2 by the Supreme Court of Colorado. Ibid.
In reaching this conclusion, the Court considers it unnecessary to decide the validity of the State's argument that Amendment 2 does not deprive homosexuals of the “protection [afforded by] general laws and policies that prohibit arbitrary discrimination in governmental and private settings.” I agree that we need not resolve that dispute, because the Supreme Court of Colorado has resolved it for us. In the case below, 882 P.2d 1335 (1994), the Colorado court stated:

“[I]t is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age, § 24-34-402(1)(a), 10A C.R.S. (1994 Supp.); marital or family status, § 24-34-502(1)(a), 10A C.R.S. (1994 Supp.); veterans' status, § 28-3-506, 11B C.R.S. (1989); and for any legal, off-duty conduct such as smoking tobacco, § 24-34-402.5, 10A C. R.S. (1994 Supp.). Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of antidiscrimination laws intended to protect gays, lesbians, and bisexuals.” Id., at 1346, n 9 (emphasis added).

The Court utterly fails to distinguish this portion of the Colorado court's opinion. Colorado Rev. Stat. § 24-34-402.5 (Supp.1995), which this passage authoritatively declares not to be affected by Amendment 2, was respondents' primary example of a generally applicable law whose protections would be unavailable to homosexuals under Amendment 2. See Brief for Respondents Evans et al. 11-12. The clear import of the Colorado court's conclusion that it is not affected is that “general laws and policies that prohibit arbitrary discrimination” would continue to prohibit discrimination on the basis of homosexual conduct as well. This analysis, which is fully in accord with (indeed, follows inescapably from) the text of the constitutional provision, lays to rest such horribles, raised in the course of oral argument, as the prospect that assaults upon homosexuals could not be prosecuted. The amendment prohibits special treatment of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the “life partner” of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State's general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.

Despite all of its hand wringing about the potential effect of Amendment 2 on general antidiscrimination laws, the Court's opinion ultimately does not dispute all this, but assumes it to be true. See ante, at 1626. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the State Constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged “equal protection” violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.
The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature – unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.

The Court might reply that the example I have given is not a denial of equal protection only because the same “rational basis” (avoidance of corruption) which renders constitutional the substantive discrimination against relatives (i.e., the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the electoral-procedural discrimination against them (i.e., the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why “electoral-procedural discrimination” has not hitherto been heard of: A law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something special – something that cannot be justified by normal “rational basis” analysis – in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment – for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In Bowers v. Hardwick, 478 U.S. 186 (1986), we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years – making homosexual conduct [i.e., sodomy] a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents' briefs did not urge overruling Bowers, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling, Tr. of Oral Arg. 53. If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: “If the Court [in Bowers ] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class
criminal.” Padula v. Webster, 822 F.2d 97, 103 (1987).) And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct.

Concerning Justice Scalia’s cite to *Bowers v. Hardwick* in his opinion, note the Supreme Court in 2003 overruled *Bowers* in *Lawrence v. Texas*, excerpted at § 27.1.1, over Justice Scalia’s objection.

§ 19.3  **Rational Relationship under Minimum Rationality Review**

*Railway Express Agency, Inc. v. New York*

336 U.S. 106 (1949)

Justice DOUGLAS delivered the opinion of the Court.

Section 124 of the Traffic Regulations of the City of New York promulgated by the Police Commissioner provides: "No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Appellant is engaged in a nation-wide express business. It operates about 1,900 trucks in New York City and sells the space on the exterior sides of these trucks for advertising. That advertising is for the most part unconnected with its own business. [FN 2: The advertisements for which appellant was convicted consisted of posters from three by seven feet to four by ten feet portraying Camel Cigarettes, Ringling Brothers and Barnum & Bailey Circus, and radio station WOR. Drivers of appellant's trucks carrying advertisements of Prince Albert Smoking Tobacco and the United States Navy were also convicted.] It was convicted in the magistrate's court and fined. The judgment of conviction was sustained in the Court of Special Sessions. 67 N.Y.S.2d 732. The Court of Appeals affirmed without opinion by a divided vote. 77 N. E. 2d 13. The case is here on appeal. Judicial Code § 237 (a), 28 U.S.C. § 344(a), as amended, 28 U.S.C.A. § 344(a) (now § 1257).

The Court in *Fifth Ave. Coach Co. v. New York*, 221 U.S. 467, sustained the predecessor ordinance to the present regulation over the objection that it violated the due process and equal protection clauses of the Fourteenth Amendment. It is true that that was a municipal ordinance resting on the broad base of the police power, while the present regulation stands or falls merely as a traffic regulation. But we do not believe that distinction warrants a different result in the two cases.

The Court of Special Sessions concluded that advertising on vehicles using the streets of New York City constitutes a distraction to vehicle drivers and to pedestrians alike and therefore affects the safety of the public in the use of the streets. We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass
judgment on its wisdom. See Olsen v. Nebraska, 313 U.S. 236 [(1941) (statute fixing maximum compensation which a private employment agency might collect from an applicant for employment constitutional under post-1937 Carolene Products-style reasoning)]. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

The question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. Patsone v. Pennsylvania, 232 U.S. 138, 144; Marcus Brown Co. v. Feldman, 256 U.S. 170, 198-199; Metropolitan Co. v. Brownell, 294 U.S. 580, 585-586. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. Central Lumber Co. v. South Dakota, 226 U.S. 157, 160.

It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by S. C. Hwy. Dept. v. Barnwell Bros., 303 U.S. 177, 187 et seq. And see Maurer v. Hamilton, 309 U.S. 598.
Justice RUTLEDGE acquiesces in the Court's opinion and judgment, *dubitante* on the question of equal protection of the laws.

Justice JACKSON, concurring.

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government – state, municipal and federal – from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

This case affords an illustration. Even casual observations from the sidewalks of New York will show that an ordinance which would forbid all advertising on vehicles would run into conflict with many interests, including some, if not all, of the great metropolitan newspapers, which use that advertising extensively. Their blandishment of the latest sensations is not less a cause of diverted attention and traffic hazard than the commonplace cigarette advertisement which this truck-owner is forbidden to display. But any regulation applicable to all such advertising would require much clearer justification in local conditions to enable its enactment than does some regulation applicable to a few. I do not mention this to criticize the motives of those who enacted this ordinance, but it dramatizes the point that we are much more likely to find arbitrariness in the regulation of the few than of the many.

In this case, if the City of New York should assume that display of any advertising on vehicles tends and intends to distract the attention of persons using the highways and to increase the dangers of its
traffic, I should think it fully within its constitutional powers to forbid it all. The same would be true if the City should undertake to eliminate or minimize the hazard by any generally applicable restraint, such as limiting the size, color, shape or perhaps to some extent the contents of vehicular advertising. Instead of such general regulation of advertising, however, the City seeks to reduce the hazard only by saying that while some may, others may not exhibit such appeals. The same display, for example, advertising cigarettes, which this appellant is forbidden to carry on its trucks, may be carried on the trucks of a cigarette dealer and might on the trucks of this appellant if it dealt in cigarettes. And almost an identical advertisement, certainly one of equal size, shape, color and appearance, may be carried by this appellant if it proclaims its own offer to transport cigarettes.

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those who do so for hire be prohibited, while those who do so for their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.

Of course, this appellant did not hold itself out to carry or display everybody's advertising, and its rental of space on the sides of its trucks was only incidental to the main business which brought its trucks into the streets. But it is not difficult to see that, in a day of extravagant advertising more or less subsidized by tax deduction, the rental of truck space could become an obnoxious enterprise. While I do not think highly of this type of regulation, that is not my business, and in view of the control I would concede to cities to protect citizens in quiet and orderly use for their proper purposes of the highways and public places (see dissent in Saia v. New York, 334 U.S. 558, 566).

As excerpted above, Justice Douglas wrote for the Court that the underinclusiveness was rational because the local authorities "may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use." Thus, the legislature was attacking the greater part of the problem first. Presumably, in reaching this conclusion, Justice Douglas had in mind that the legislative might have concluded that the nature of the ads for other businesses were more likely to be eye-catching, since the company was paying for the advertising space, and thus their nature was more likely to be distracting. In addition, the legislature may well have concluded that the extent of such advertising was likely to be greater than the number of owners placing ads for their own business on the side of their trucks. It is important to note that the Court did not say in Railway Express that the Court was convinced that the nature and extent of the advertising on the side of trucks was different between ads for hire and ads for one's own business. The statute was held to be constitutional once the Court decided that the legislature “may well have concluded” the nature and extent of the advertising was different, and such a conclusion was not shown by the challenger to be “irrational.” Since 1976, a regulation of advertisements would raise First Amendment problems under the Court’s

City of Cleburne v. Cleburne Living Center
473 U.S. 432 (1985)

Justice WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a “quasi-suspect” classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC), for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations.

The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of “[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions.” The city had determined that the proposed group home should be classified as a “hospital for the feebleminded.” After holding a public hearing on CLC’s application, the City Council voted 3 to 1 to deny a special use permit.

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, inter alia, that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found that “[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance,” and that the City Counsel's decision “was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.” App. 93, 94. Even so, the District Court held the ordinance and its application constitutional. Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny
applicable to equal protection claims. The court deemed the ordinance, as written and applied, to be rationally related to the city's legitimate interests in “the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood,” and the number of people to be housed in the home.

The Court of Appeals for the Fifth Circuit reversed, determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under intermediate-level scrutiny. 726 F.2d 191 (1984). Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of “unfair and often grotesque mistreatment” of the retarded, discrimination against them was “likely to reflect deep-seated prejudice.” Id., at 197. In addition, the mentally retarded lacked political power, and their condition was immutable. The court considered heightened scrutiny to be particularly appropriate in this case, because the city's ordinance withheld a benefit which, although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community. Applying the test that it considered appropriate, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interests. The Court of Appeals went on to hold that the ordinance was also invalid as applied. Rehearing en banc was denied with six judges dissenting in an opinion urging en banc consideration of the panel's adoption of a heightened standard of review. We granted certiorari, 469 U.S. 1016 (1984).

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation [Ed.: i.e., minimum rationality review. This aspect of the Court’s opinion on what level of review to adopt is excerpted at § 23.1.].

We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded. We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-502 (1985); United States v. Grace, 461 U.S. 171 (1983); NAACP v. Button, 371 U.S. 415 (1963).

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 896
and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Palmore v. Sidoti, 466 U.S. 429, 433 (1984). [Ed.: Thus, deference to such animus toward the mentally retarded illegitimate.]

Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home’s location was that it was located on “a five hundred year flood plain.” This concern with the possibility of a flood [and evacuation needs], however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council – doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard. [Ed.: i.e., they are not a greater part of the problem.]

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that “[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance.” App. 93; 726 F.2d, at 200. Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. See 42 CFR § 442.447 (1984). In the words of the Court of Appeals, “[t]he City never justifies its apparent view that other people can live under such ‘crowded’ conditions when mentally retarded persons cannot.” 726 F.2d, at 202.

The city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for
the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood. [Ed.: Again, the mentally retarded are not a greater part of the problem.]

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

Justice STEVENS, with whom THE CHIEF JUSTICE joins, concurring.

Every law that places the mentally retarded in a special class is not presumptively irrational. The differences between mentally retarded persons and those with greater mental capacity are obviously relevant to certain legislative decisions. An impartial lawmaker – indeed, even a member of a class of persons defined as mentally retarded – could rationally vote in favor of a law providing funds for special education and special treatment for the mentally retarded. A mentally retarded person could also recognize that he is a member of a class that might need special supervision in some situations, both to protect himself and to protect others. Restrictions on his right to drive cars or to operate hazardous equipment might well seem rational even though they deprived him of employment opportunities and the kind of freedom of travel enjoyed by other citizens. “That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable.” Ante, at 3257.

Even so, the Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded “have been subjected to a history of unfair and often grotesque mistreatment.” 726 F.2d 191, 197 (CA5 1984). The discrimination against the mentally retarded that is at issue in this case is the city's decision to require an annual special use permit before property in an apartment house district may be used as a group home for persons who are mildly retarded. The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent's home.

Although the city argued in the Court of Appeals that legitimate interests of the neighbors justified the restriction, the court unambiguously rejected that argument. Id., at 201. In this Court, the city has argued that the discrimination was really motivated by a desire to protect the mentally retarded from the hazards presented by the neighborhood. Zoning ordinances are not usually justified on any such basis, and in this case, for the reasons explained by the Court, ante, at 3258-3260, I find that justification wholly unconvincing. I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case.

Accordingly, I join the opinion of the Court.
Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, concurring in the judgment in part and dissenting in part.

In light of the scrutiny that should be applied here, Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents. I must dissent from the novel proposition that “the preferred course of adjudication” is to leave standing a legislative Act resting on “irrational prejudice” ante, at 3260, thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet.

The Court appears to act out of a belief that the ordinance might be “rational” as applied to some subgroup of the retarded under some circumstances, such as those utterly without the capacity to live in a community, and that the ordinance should not be invalidated in toto if it is capable of ever being validly applied. But the issue is not “whether the city may never insist on a special use permit for the mentally retarded in an R-3 zone.” Ante, at 3258. The issue is whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the “feeble-minded,” or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.

By leaving the sweeping exclusion of the “feebleminded” to be applied to other groups of the retarded, the Court has created peculiar problems for the future. The Court does not define the relevant characteristics of respondents or their proposed home that make it unlawful to require them to seek a special permit. Nor does the Court delineate any principle that defines to which, if any, set of retarded people the ordinance might validly be applied. Cleburne's City Council and retarded applicants are left without guidance as to the potentially valid, and invalid, applications of the ordinance. As a consequence, the Court's as-applied remedy relegates future retarded applicants to the standardless discretion of low-level officials who have already shown an all too willing readiness to be captured by the “vague, undifferentiated fears” of ignorant or frightened residents.

Invalidating on its face the ordinance's special treatment of the “feebleminded,” in contrast, would place the responsibility for tailoring and updating Cleburne's unconstitutional ordinance where it belongs: with the legislative arm of the City of Cleburne. If Cleburne perceives a legitimate need for requiring a certain well-defined subgroup of the retarded to obtain special permits before establishing group homes, Cleburne will, after studying the problem and making the appropriate policy decisions, enact a new, more narrowly tailored ordinance. That ordinance might well look very different from the current one; it might separate group homes (presently treated nowhere in the ordinance) from hospitals, and it might define a narrow subclass of the retarded for whom even group homes could legitimately be excluded. Special treatment of the retarded might be ended altogether. But whatever the contours such an ordinance might take, the city should not be allowed to keep its ordinance on the books intact and thereby shift to the courts the responsibility to confront the complex empirical and policy questions involved in updating statutes affecting the mentally
A legislative solution would yield standards and provide the sort of certainty to retarded applicants and administrative officials that case-by-case judicial rulings cannot provide. Retarded applicants should not have to continue to attempt to surmount Cleburne's vastly overbroad ordinance.

§ 19.4 Irrational Burdens under Minimum Rationality Review

New York City Transit Authority v. Beazer
440 U.S. 568 (1979)

Justice STEVENS delivered the opinion of the Court.

The New York City Transit Authority refuses to employ persons who use methadone. The District Court found that this policy violates the Equal Protection Clause of the Fourteenth Amendment. In a subsequent opinion, the court also held that the policy violates Title VII of the Civil Rights Act of 1964. The Court of Appeals affirmed without reaching the statutory question. The departure by those courts from the procedure normally followed in addressing statutory and constitutional questions in the same case, as well as concern that the merits of these important questions had been decided erroneously, led us to grant certiorari. 438 U.S. 904. We now reverse.

The Transit Authority (TA) operates the subway system and certain bus lines in New York City. It employs about 47,000 persons, of whom many – perhaps most – are employed in positions that involve danger to themselves or to the public. For example, some 12,300 are subway motormen, towermen, conductors, or bus operators. The District Court found that these jobs are attended by unusual hazards and must be performed by “persons of maximum alertness and competence.” 399 F.Supp. 1032, 1052 (SDNY 1975). Certain other jobs, such as operating cranes and handling high-voltage equipment, are also considered “critical” or “safety sensitive,” while still others, though classified as “noncritical,” have a potentially important impact on the overall operation of the transportation system.

TA enforces a general policy against employing persons who use narcotic drugs. The policy is reflected in Rule 11(b) of TA's Rules and Regulations: “Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director – Chief Surgeon of the System.”

Methadone is regarded as a narcotic within the meaning of Rule 11(b). No written permission has ever been given by TA's medical director for the employment of a person using methadone.

The District Court found that methadone is a synthetic narcotic and a central nervous system depressant. If injected into the bloodstream with a needle, it produces essentially the same effects as heroin. Methadone has been used legitimately in at least three ways – as a pain killer, in “detoxification units” of hospitals as an immediate means of taking addicts off of heroin, and in
long-range “methadone maintenance programs” as part of an intended cure for heroin addiction. See 21 CFR § 310.304(b) (1978). In such programs the methadone is taken orally in regular doses for a prolonged period. As so administered, it does not produce euphoria or any pleasurable effects associated with heroin; on the contrary, it prevents users from experiencing those effects when they inject heroin, and also alleviates the severe and prolonged discomfort otherwise associated with an addict's discontinuance of the use of heroin.

The evidence indicates that methadone is an effective cure for the physical aspects of heroin addiction. But the District Court also found “that many persons attempting to overcome heroin addiction have psychological or life-style problems which reach beyond what can be cured by the physical taking of doses of methadone.” 399 F.Supp., at 1039. The crucial indicator of successful methadone maintenance is the patient's abstinence from the illegal or excessive use of drugs and alcohol. The District Court found that the risk of reversion to drug or alcohol abuse declines dramatically after the first few months of treatment. Indeed, “the strong majority” of patients who have been on methadone maintenance for at least a year are free from illicit drug use. But a significant number are not. On this critical point, the evidence relied upon by the District Court reveals that even among participants with more than 12 months' tenure in methadone maintenance programs, the incidence of drug and alcohol abuse may often approach and even exceed 25%.

This litigation was brought by the four respondents as a class action on behalf of all persons who have been, or would in the future be, subject to discharge or rejection as employees of TA by reason of participation in a methadone maintenance program. Two of the respondents are former employees of TA who were dismissed while they were receiving methadone treatment. The other two were refused employment by TA, one both shortly before and shortly after the successful conclusion of his methadone treatment, and the other while he was taking methadone. Their complaint alleged that TA's blanket exclusion of all former heroin addicts receiving methadone treatment was illegal under the Civil Rights Act of 1866, Rev. Stat. § 1977, 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., and the Equal Protection Clause of the Fourteenth Amendment.

Respondents contend that the recent amendment to § 7(6) of the Rehabilitation Act proscribes TA's enforcement of a general rule denying employment to methadone users. Even if respondents correctly interpret the amendment, and even if they have a right to enforce that interpretation, the case is not moot since their claims arose even before the Act itself was passed, and they have been awarded monetary relief. Moreover, the language of the statute, even after its amendment, is not free of ambiguity, and no administrative or judicial opinions specifically considering the impact of the statute on methadone users have been called to our attention. Of greater importance, it is perfectly clear that however we might construe the Rehabilitation Act, the concerns that prompted our grant of certiorari would still merit our attention. We therefore decline to give the statute its first judicial construction at this stage of the litigation.

Although respondents have consistently relied on both statutory and constitutional claims, the lower courts focused primarily on the latter. Thus, when the District Court decided the Title VII issue, it did so only as an afterthought in order to support an award of attorney's fees; the Court of Appeals
did not even reach the Title VII issue. We do not condone this departure from settled federal practice. “If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105. Before deciding the constitutional question, it was incumbent on those courts to consider whether the statutory grounds might be dispositive. Whatever their reasons for not doing so, we shall first dispose of the Title VII issue.

The District Court's findings do not support its conclusion that TA's regulation prohibiting the use of narcotics, or its interpretation of that regulation to encompass users of methadone, violated Title VII of the Civil Rights Act. [Ed.: The Court then held that the evidence was insufficient to show the rule involved racial discrimination against African-American and Hispanic job applicants in violation of Title VII. Thus, the Court then turned to the Equal Protection Clause analysis].

Respondents no longer question the need, or at least the justification, for special rules for methadone users. Indeed, they vigorously defend the District Court's opinion which expressly held that it would be permissible for TA to have a special rule denying methadone users any employment unless they had been undergoing treatment for at least a year, and another special rule denying even the most senior and reliable methadone users any of the more dangerous jobs in the system.

The constitutional defect in TA's employment policies, according to the District Court, is not that TA has special rules for methadone users, but rather that some members of the class should have been exempted from some requirements of the special rules. Left intact by its holding are rules requiring special supervision of methadone users to detect evidence of drug abuse, and excluding them from high-risk employment. Accepting those rules, the District Court nonetheless concluded that employment in nonsensitive jobs could not be denied to methadone users who had progressed satisfactorily with their treatment for one year, and who, when examined individually, satisfied TA's employment criteria. In short, having recognized that disparate treatment of methadone users simply because they are methadone users is permissible – and having excused TA from an across-the-board requirement of individual consideration of such persons – the District Court construed the Equal Protection Clause as requiring TA to adopt additional and more precise special rules for that special class.

But any special rule short of total exclusion that TA might adopt is likely to be less precise – and will assuredly be more costly – than the one that it currently enforces. If eligibility is marked at any intermediate point – whether after one year of treatment or later – the classification will inevitably discriminate between employees or applicants equally or almost equally apt to achieve full recovery. Even the District Court's opinion did not rigidly specify one year as a constitutionally mandated measure of the period of treatment that guarantees full recovery from drug addiction. The uncertainties associated with the rehabilitation of heroin addicts precluded it from identifying any bright line marking the point at which the risk of regression ends. By contrast, the “no drugs” policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an
intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

At its simplest, the District Court's conclusion was that TA's rule is broader than necessary to exclude those methadone users who are not actually qualified to work for TA. We may assume not only that this conclusion is correct but also that it is probably unwise for a large employer like TA to rely on a general rule instead of individualized consideration of every job applicant. But these assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause. As the District Court recognized, the special classification created by TA's rule serves the general objectives of safety and efficiency. Moreover, the exclusionary line challenged by respondents “is not one which is directed ‘against’ any individual or category of persons, but rather it represents a policy choice . . . made by that branch of Government vested with the power to make such choices.” Marshall v. United States, 414 U.S. 417, 428. Because it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole. Mathews v. Diaz, 426 U.S. 67, 83-84.

No matter how unwise it may be for TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision. The judgment of the Court of Appeals is reversed.

Justice BRENNAN, dissenting.

I would affirm for the reasons stated in Part I of Justice WHITE's dissenting opinion.

Justice WHITE, with whom Justice MARSHALL joins, dissenting.

Although the Court purports to apply settled principles to unique facts, the result reached does not square with either Title VII or the Equal Protection Clause. Accordingly, but respectfully, I dissent.

I

As an initial matter, the Court is unwise in failing to remand the statutory claims to the Court of Appeals. The District Court decided the Title VII issue only because it provided a basis for allowing attorney's fees. 414 F.Supp. 277, 278 (SDNY 1976). The Court of Appeals did not deal with Title VII, relying instead on the intervening passage of the Civil Rights Attorney's Fees Awards Act of 1976, which authorized the award of fees for success on the equal protection claim today held infirm by the Court. 558 F.2d 97, 99-100 (CA2 1977). In such circumstances, on finding that we disagree with the judgment of the Court of Appeals as to the constitutional question, we would usually remand the unexplored alternative basis for relief. E.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978). And see Arlington Heights v. Metropolitan Housing Dev. Corp.,
429 U.S. 252, 271 (1977), which involved nearly identical circumstances. That course would obviate the need for us to deal with what the Court considers to be a factual issue or at least would provide assistance in analyzing the issue.

II

I also disagree with the Court's disposition of the equal protection claim in light of the facts established below. The District Court found that the evidence conclusively established that petitioners exclude from employment all persons who are successfully on methadone maintenance – that is, those who after one year are “free of the use of heroin, other illicit drugs, and problem drinking,” 399 F.Supp. 1032, 1047 (SDNY 1975) – and those who have graduated from methadone programs and remain drug free for less than five years; that past or present successful methadone maintenance is not a meaningful predictor of poor performance or conduct in most job categories; that petitioners could use their normal employee-screening mechanisms to separate the successfully maintained users from the unsuccessful; and that petitioners do exactly that for other groups that common sense indicates might also be suspect employees. Petitioners did not challenge these factual conclusions in the Court of Appeals, but that court nonetheless reviewed the evidence and found that it overwhelmingly supported the District Court's findings. 558 F.2d, at 99. It bears repeating, then, that both the District Court and the Court of Appeals found that those who have been maintained on methadone for at least a year and who are free from the use of illicit drugs and alcohol can easily be identified through normal personnel procedures and, for a great many jobs, are as employable as and present no more risk than applicants from the general population.

The question before us is the rationality of placing successfully maintained or recently cured persons in the same category as those just attempting to escape heroin addiction or who have failed to escape it, rather than in with the general population. The asserted justification for the challenged classification is the objective of a capable and reliable work force, and thus the characteristic in question is employability. “Employability,” in this regard, does not mean that any particular applicant, much less every member of a given group of applicants, will turn out to be a model worker. Nor does it mean that no such applicant will ever become or be discovered to be a malingerer, thief, alcoholic, or even heroin addict. All employers take such risks. Employability, as the District Court used it in reference to successfully maintained methadone users, means only that the employer is no more likely to find a member of that group to be an unsatisfactory employee than he would an employee chosen from the general population.

Petitioners had every opportunity, but presented nothing to negative the employability of successfully maintained methadone users as distinguished from those who were unsuccessful. Instead, petitioners, like the Court, dwell on the methadone failures – those who quit the programs or who remain but turn to illicit drug use. The Court, for instance, makes much of the drug use of many of those in methadone programs, including those who have been in such programs for more than one year. Ante, at 1360-1361, and n.10. But this has little force since those persons are not “successful,” can be and have been identified as such, see ante, at 1360, and, despite the Court's efforts to put them there, see ante, at 1368 n.33, are not within the protection of the District Court's injunction. That 20% to 30% are unsuccessful after one year in a methadone program tells us
nothing about the employability of the successful group, and it is the latter category of applicants that the District Court and the Court of Appeals held to be unconstitutionally burdened by the blanket rule disqualifying them from employment.

Finally, even were the District Court wrong, and even were successfully maintained persons marginally less employable than the average applicant, the blanket exclusion of only these people, when but a few are actually unemployable and when many other groups have varying numbers of unemployable members, is arbitrary and unconstitutional. Many persons now suffer from or may again suffer from some handicap related to employability. But petitioners have singled out respondents—unlike ex-offenders, former alcoholics and mental patients, diabetics, epileptics, and those currently using tranquilizers, for example—for sacrifice to this at best ethereal and likely nonexistent risk of increased unemployability. Such an arbitrary assignment of burdens among classes that are similarly situated with respect to the proffered objectives is the type of invidious choice forbidden by the Equal Protection Clause.

As of April, 1987, the New York City Transit Authority revised its policy on drugs, to limit the circumstances under which employees can be ordered to take drug tests. The Authority will continue to test workers involved in incidents such as derailments and those whom it has "reason to believe" are impaired by marijuana, cocaine, heroin or other controlled substances. But supervisors will not be able to order tests for employees simply because they have been charged with offenses such as insubordination or after brief absences, which a union contended in a lawsuit had been the practice. The policy also guarantees that employees who fail the tests but complete Authority rehabilitation programs will be reinstated, provided they were not involved in accidents that injured passengers or other workers.

United States Department of Agriculture v. Moreno
413 U.S. 528 (1973)

Justice BRENNAN delivered the opinion of the Court.

This case requires us to consider the constitutionality of § 3(e) of the Food Stamp Act of 1964, 7 U.S.C. § 2012(e), as amended in 1971, 84 Stat. 2048, which, with certain exceptions, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. In practical effect, § 3(e) creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest. The latter class of persons is denied federal food assistance. A three-judge District Court for the District of Columbia held this classification invalid as violative of the Due Process Clause of the Fifth Amendment. 345 F.Supp. 310 (1972). We noted probable jurisdiction. 409 U.S. 1036 (1972). We affirm.
Appellees in this case consist of several groups of individuals who allege that, although they satisfy the income eligibility requirements for federal food assistance, they have nevertheless been excluded from the program solely because the persons in each group are not ‘all related to each other.’ Appellee Jacinta Moreno, for example is a 56-year-old diabetic who lives with Ermina Sanchez and the latter’s three children. They share common living expenses, and Mrs. Sanchez helps to care for appellee.

Appellee Victoria Keppler has a daughter with an acute hearing deficiency. The daughter requires special instruction in a school for the deaf. The school is located in an area in which appellee could not ordinarily afford to live. Thus, in order to make the most of her limited resources, appellee agreed to share an apartment near the school with a woman who, like appellee, is on public assistance. Since appellee is not related to the woman, appellee's food stamps have been, and will continue to be, cut off if they continue to live together.

These and two other groups of appellees instituted a class action against the Department of Agriculture, its Secretary, and two other departmental officials, seeking declaratory and injunctive relief against the enforcement of the 1971 amendment of § 3(e) and its implementing regulations. In essence, appellees contend, and the District Court held, that the “unrelated person” provision of § 3(e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. We agree.

Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest. See Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961). The purposes of the Food Stamp Act were expressly set forth in the congressional “declaration of policy”: “It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-in-come households to purchase a nutritionally adequate diet through normal channels of trade.” 7 U.S.C. § 2011.

The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, “[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.” 345 F.Supp., at 313.
Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional “declaration of policy.” Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment of § 3(e). The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called “hippies” and “hippie communes” from participating in the food stamp program. See H.R. Conf. Rep. No. 91-1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, “(a) purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify the 1971 amendment.” 345 F.Supp. at 314 n.11.

Although apparently conceding this point, the Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program. In essence, the Government contends that, in adopting the 1971 amendment, Congress might rationally have thought (1) that households with one or more unrelated members are more likely than “fully related” households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are “relatively unstable,” thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between “related” and “unrelated” households we still could not agree with the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

At the outset, it is important to note that the Food Stamp Act itself contains provisions, wholly independent of § 3(e), aimed specifically at the problems of fraud and of the voluntarily poor. For example, with certain exceptions, § 5(c) of the Act, 7 U.S.C. § 2014(c), renders ineligible for assistance any household containing “an able-bodied adult person between the ages of eighteen and sixty-five” who fails to register for, and accept, offered employment. Similarly, § 14(b) and (c), 7 U.S.C. § 2023(b) and (c), specifically impose strict criminal penalties upon any individual who obtains or uses food stamps fraudulently. The existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses. See Eisenstadt v. Baird, 405 U.S. 438, 452 (1972); cf. Dunn v. Blumstein, 405 U.S. 330, 353-354 (1972).

Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. As previously noted, § 3(e) defines an eligible “household” as “a group of related individuals . . . (1) living as one economic unit (2) sharing common cooking facilities [and 3] for whom food is customarily purchased in common.” Thus, two unrelated persons living together and meeting all three of these conditions would constitute a single household ineligible for assistance. If financially feasible, however, these same two individuals can legally avoid the “unrelated person” exclusion simply by altering their living arrangements so as to
eliminate any one of the three conditions. By so doing, they effectively create two separate “households” both of which are eligible for assistance. See Knowles v. Butz, 358 F.Supp. 228 (ND Cal. 1973). Indeed, as the California Director of Social Welfare has explained: “The ‘related household’ limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically aimed at the ‘hippies’ and ‘hippie communes.’ Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.”

Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, not those persons who are “likely to abuse the program,” but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Traditional equal protection analysis does not require that every classification be drawn with precise “mathematical nicety.” Dandridge v. Williams, 397 U.S., at 485. But the classification here in issue is not only “imprecise,” [the burden it imposes] is wholly without any rational basis. The judgment of the District Court holding the “unrelated person” provision invalid under the [Ed.: Equal Protection component of the] Due Process Clause of the Fifth Amendment is therefore affirmed.

Justice REHNQUIST, with whom THE CHIEF JUSTICE concurs, dissenting.

For much the same reasons as those stated in my dissenting opinion in United States Department of Agriculture v. Murry, 413 U.S. 508, 522 [(1973)], I am unable to agree with the Court's disposition of this case. Here appellees challenged a provision in the Federal Food Stamp Act, 7 U.S.C. § 2011 et seq., which limited food stamps to related people living in one “household.” The result of this provision is that unrelated persons who live under the same roof and pool their resources may not obtain food stamps even though otherwise eligible.

The Court's opinion would make a very persuasive congressional committee report arguing against the adoption of the limitation in question. Undoubtedly, Congress attacked the problem with a rather blunt instrument and, just as undoubtedly, persuasive arguments may be made that what we conceive to be its purpose will not be significantly advanced by the enactment of the limitation. But questions such as this are for Congress, rather than for this Court; our role is limited to the determination of whether there is any rational basis on which Congress could decide that public funds made available under the food stamp program should not go to a household containing an individual who is unrelated to any other member of the household.

I do not believe that asserted congressional concern with the fraudulent use of food stamps is, when interpreted in the light most favorable to sustaining the limitation, quite as irrational as the Court seems to believe. A basic unit which Congress has chosen for determination of availability for food stamps is the “household,” a determination which is not criticized by the Court. By the limitation here challenged, it has singled out households which contain unrelated persons and made such
households ineligible. I do not think it is unreasonable for Congress to conclude that the basic unit which it was willing to support with federal funding through food stamps is some variation on the family as we know it – a household consisting of related individuals. This unit provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps.

Admittedly, as the Court points out, the limitation will make ineligible many households which have not been formed for the purpose of collecting federal food stamps, and will at the same time not wholly deny food stamps to those households which may have been formed in large part to take advantage of the program. But, as the Court concedes, “[t]raditional equal protection analysis does not require that every classification be drawn with precise ‘mathematical nicety.’” And earlier this term, the constitutionality of a similarly “imprecise” rule promulgated pursuant to the Truth in Lending Act was challenged on grounds such as those urged by appellees here. In Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), the imposition of the rule on all members of a defined class was sustained because it served to discourage evasion by a substantial portion of that class of disclosure mechanisms chosen by Congress for consumer protection.

The limitation which Congress enacted could, in the judgment of reasonable men, conceivably deny food stamps to members of households which have been formed solely for the purpose of taking advantage of the food stamp program. Since the food stamp program is not intended to be a subsidy for every individual who desires low-cost food, this was a permissible congressional decision.

With regard to the “class-of-one” kind of Equal Protection case involved in Village of Willowbrook v. Olech, cited above at § 19.1 n.6, the Court held in Engquist v. Oregon Dep’t of Agriculture,55 that the “class-of-one” theory of equal protection does not apply in the context of public employment. Per Chief Justice Roberts, the Court noted, “We have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.” Roberts said allowing a challenge based on arbitrary singling out of a person would undermine the very discretion that such state officials are entrusted to exercise. The Court added, “Public employees typically have a variety of protection from just the sort of personnel actions about which Engquist complains [such as Civil Service statutory protection for many federal employees], but the Equal Protection Clause is not one of them.”56

In dissent, Justice Stevens, joined by Justices Souter and Ginsburg, would have applied “class-of-one” doctrine to employment decisions. Stevens noted that “a discretionary decision with any ‘reasonably conceivable’ rational justification will not support an equal protection claim; only a truly arbitrary one will.” Thus, Justice Stevens concluded that “all but a handful [of class-of-one complaints] are dismissed well in advance of trial.” Thus, there is little concern with the possibility


of a multitude of cases. In response, the majority opinion agreed that to prevail plaintiff would have to prove “the government’s differential treatment was intentional, that the plaintiff was treated differently from other similarly situated persons, and that the unequal treatment was not rationally related to a legitimate government interest.” However, there would still be a cost, since the “courts will be obliged to sort through [each claim] in a search for the proverbial needle in a haystack.”

After Engquist, “class of one” Equal Protection cases can still be brought outside the public employment context. For example, in SBT Holdings, LLC v. Westminster, Massachusetts, the First Circuit allowed a developer to proceed on a claim that a local commission unconstitutionally singled it out for wetlands protection enforcement. The Seventh Circuit split 5-5 in an en banc opinion, with 3 opinions adopting different tests for “class of one” equal-protection claims.

On recent minimum rationality review cases, see Johnson v. Department of Justice, 341 P.3d 1075 (Cal. 2015) (5-2 decision that mandatory lifetime registration requirement for certain defendants convicted of nonforcible oral copulation or sodomy with a minor, but not for sexual intercourse with a minor, rational, based in part on granting discretion where support of children conceived as a result of unlawful intercourse could be involved); Goodpaster v. City of Indianapolis, 736 F.3d 1060 (7th Cir. 2013) (ordinance banning smoking in traditional bars, but not tobacco specialty bars, rational); Sensational Smiles, LLC v. Mullen, 793 F.2d 281 (2nd Cir. 2015) (regulation that only licensed dentists may shine light emitting diode (LED) lamp at mouth of consumer to whiten teeth rational). But see Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014) (Arizona provision denying driver’s licenses to “Deferred Action for Childhood Arrivals” noncitizens who have federal Employment Authorization Documents (EAD), while allowing licenses for other noncitizens with federal EADs, irrational); Paul Stieler Enterp., Inc. v. City of Evansville, 2 N.E.3d 1269 (Ind. 2014) (smoking ban exempting riverboat casinos unreasonable under Indiana Constitution’s Equal Privileges & Immunities Clause, given “independent interpretation” from federal Equal Protection).

57 Id. at 2159, 2161 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).
58 Id. at 2157 (Roberts, C.J., for the Court).
59 547 F.3d 28 (1st Cir. 2008).
60 Del Marcelle v. Brown County Corp., 680 F.3d 887, 889 (7th Cir. 2012) (Posner, J., joined by Kanne, Sykes & Tinder, lead opinion) (need to show “intent to disfavor” plaintiff based on “animus” or other “improper personal motivations”); id. at 900 (Easterbrook, J., concurring in the judgment) (plaintiff must show “no reasonably conceivable state of facts” provide a “rational basis” for state action); id. at 905 (Wood, J., joined by Flaum, Rovner, Williams & Hamilton, dissenting) (plaintiff victim of “intentional discrimination” and no “rational basis” for the treatment). See also Analytical Diagnostics Labs v. Kusel, 626 F.3d 135, 140 (2nd Cir. 2010) (imposing animus requirement, but also requiring plaintiff to show that decisionmakers were aware of other similarly-situated individuals who were treated differently); Linquist v. City of Pasadena, 525 F.3d 383, 387 (5th Cir. 2008) (rejecting animus requirement).
CHAPTER 20: RACIAL CLASSIFICATIONS AND STRICT SCRUTINY

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§ 20.1 Introduction to Racial Classifications and Strict Scrutiny

As indicated in Nordlinger v. Hahn,1 cited at § 19.1 n.10, “[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” Where a classification does jeopardizes a fundamental right or categorizes based on a suspect characteristic, however, the Court typically will apply some form of heightened review.

The creation of these heightened levels of review came about gradually. In the modern post-1937 era, the possibility that the Court might apply a higher standard than minimum rationality review when considering constitutional clauses that protect civil rights was first suggested explicitly in 1938 in footnote 4 of United States v. Carolene Products Co,2 excerpted at § 17.3. In later cases the phrase that has come to be associated with the highest standard of review is "strict scrutiny."

The first actual use of the term "strict scrutiny" to invalidate a law appears to have been by Justice Douglas in 1942 in Skinner v. Oklahoma.3 A similar phrase, "most rigid scrutiny," was mentioned by the Court in 1944 in one of the Japanese internment cases, Korematsu v. United States,4 excerpted at § 20.2. In Griswold v. Connecticut,5 excerpted at § 25.4, Justice Douglas stated in 1965 that laws that "sweep unnecessarily broadly" may not constitutionally be employed. In 1967, the language of Korematsu was alluded to in Loving v. Virginia,6 excerpted at § 20.3, where miscegenation

1 505 U.S. 1, 10 (1992).
2 304 U.S. 144, 152 n.4 (1938).
3 316 U.S. 535, 541 (1942).
5 381 U.S. 479, 485 (1965).
6 388 U.S. 1, 11 (1967).
statutes were struck down. Chief Justice Warren stated, “At the very least, the Equal Protection Clause demands that racial classifications, especially in criminal statutes, be subjected to the ‘most rigid scrutiny.’” In 1971, the Court in Graham v. Richardson,\(^7\) excerpted at § 23.2.1, spoke of “close judicial scrutiny” for classifications based on alienage, nationality, or race. Current judicial usage, which speaks of “strict scrutiny,” seems to have been cemented in place in 1973 in Frontiero v. Richardson,\(^8\) excerpted at § 22.2, an opinion which announced the judgment of the Court, but which was joined by only a plurality composed of Justices Douglas, Brennan, White, and Marshall. Justice Brennan wrote that classifications based on sex, like those based on race, alienage, or national origin, "are inherently suspect, and must therefore be subjected to strict judicial scrutiny."

As to what kind of governmental interest will satisfy strict scrutiny, the first use of the term “compelling” to describe the required government interest appears to have been made in 1957 by Justice Frankfurter, concurring in Sweezy v. New Hampshire.\(^9\) In 1967, the Court referred in Loving v. Virginia,\(^10\) excerpted at § 20.3, to a "legitimate overriding purpose independent of racial discrimination." The use of the term "compelling" government interest, now used in formulaic fashion by the Court, was cemented in place by Justice Blackmun, writing in 1973 in Roe v. Wade,\(^11\) excerpted at § 26.1, where he said, “Where certain ‘fundamental rights’ are involved, the Court has held that regulations limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake.”

In 1976, the Court announced in Craig v. Boren a third standard of scrutiny between rational basis review and strict scrutiny: intermediate scrutiny. As phrased in Craig v. Boren,\(^12\) excerpted at § 22.2, at intermediate scrutiny the statute “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Occasionally, the term “mid-level review” has been used to refer to this level of scrutiny.\(^13\) The more common term, however, is “intermediate review.” The Court has indicated that this intermediate review applies to classifications which, though not “suspect,” are “quasi-suspect,” as for gender discrimination.

10. 388 U.S. 1, 11 (1967).
As applied, these two versions of heightened scrutiny – strict scrutiny (for suspect classifications) and intermediate review (for quasi-suspect classifications) – track the three inquiries that the Court uses at rational basis review, but at each level increase the difficulty for the government to satisfy each inquiry. Thus, with respect to governmental interests, at rational review the government need only advance “legitimate” governmental interests for the government action to be constitutional. At intermediate review, the government must advance “important” or “substantial” governmental interests. At strict scrutiny, the governmental interests must be not only important or substantial, but “overriding” or “compelling.” The most common terms today are “substantial” and “compelling,” but sometimes the Court will use the “important” or “overriding” phrasing.

The Court has noted that certain interests, like administrative cost considerations, while legitimate, are typically not important or substantial, and thus cannot be used to justify a statute at intermediate scrutiny.\(^{14}\) On the other hand, certain interests, like diversity in broadcast programming, may be substantial, but are not compelling.\(^{15}\) Thus, they could be used to justify a statute at intermediate scrutiny, but not at strict scrutiny. Finally, certain interests, like remedying one’s own prior racial discrimination, are compelling, and thus can be used to justify a statute at strict scrutiny.\(^{16}\) Examples of other interests that have been assumed to be compelling by judges while deciding cases are national security and military defense,\(^{17}\) compliance with the Voting Rights Act,\(^{18}\) improving the delivery of health-care services to communities currently underserved,\(^{19}\) operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools,\(^{20}\) and achieving the educational benefits that flow from having a diverse student body.\(^{21}\)


\(^{15}\) See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354-55 (D.C. Cir. 1998) (“diverse programming” in broadcasting, even if an “important” interest, is not “compelling.”).

\(^{16}\) See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”).

\(^{17}\) See New York Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713, 726 (1971) (Brennan, J., concurring); id. at 728-29 (Stewart, J., joined by White, J., concurring); id. at 741-42 (Marshall, J., concurring).


\(^{19}\) Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (Powell, J., opinion).

\(^{20}\) Hunter ex rel. Brand v. Regents of the Univ. of Cal., 190 F.3d 1061, 1063-64 (9th Cir. 1999).

Once the governmental interest part of the inquiry is finished, the attention then turns, as under rational basis review, to the way in which the statute’s means further these ends. As has been noted, “Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose. . . . The means used need not be necessary, but must have a ‘substantial relationship’ to the end being sought.” In contrast, “[u]nder strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government purpose. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative.”

As under rational basis review, this inquiry has two parts: an underinclusiveness inquiry and an overinclusiveness inquiry. With regard to the underinclusiveness inquiry, at intermediate review the statute must be “substantially related” to achieving its ends. Thus, the statute must regulate “substantially” all of the individuals who are part of creating some problem. For example, the ad ban in Railway Express, excerpted at § 19.3, while rational, probably was not “substantially related” to achieving its ends because its exception for ads for the truck owners’ own business probably left too many individuals unregulated by the act to satisfy the substantial relationship test. Failing this part of the test does not mean that the legislature cannot regulate at all. It means only that the current way the legislature has drawn the line is impermissible. Thus, as a matter of equal protection law, if New York City had banned all advertisements on the side of all trucks, that would have raised no problem of underinclusiveness under either rational basis or intermediate review, since all individuals whose advertisements on the side of trucks could cause problems of distraction would have been regulated.

With regard to overinclusiveness, the statute at intermediate review must not burden “substantially more individuals than necessary” to achieve its ends. The Beazer case provides a good example of this. While the complete ban on hiring methadone users was held rational by the Court in Beazer, excerpted at § 19.4, had the Court applied intermediate review, the fact that according to the Court’s opinion probably 75% of the persons burdened by the Act had no heroin problem would likely make that statute substantially more burdensome than it needed to be. This would be true as long as some more individualized consideration of applicants would be more effective in weeding out the problem candidates, or if some more narrowly tailored ban would effectively advance the government’s interest, such as, as mentioned in the Court’s opinion, a “rule denying methadone users any employment unless they had been undergoing treatment for at least a year and [a] rule denying even the most senior and reliable methadone users any of the more dangerous jobs in the system.” At intermediate review, the extra costs associated with more individualized consideration of applicants would likely not be an effective argument to justify a complete ban, since saving administrative costs, while legitimate, and thus appropriate to use under rational basis review, is not an important or substantial governmental interest that can justify governmental action at intermediate review.

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23 Beazer, 440 U.S. at 589.

At strict scrutiny, the government has an even more difficult time justifying its action. With regard to the overinclusiveness inquiry, the government must show that its action is the “least restrictive” or “least burdensome” way to advance effectively the government’s interests.25 This means that if there is any way the government could burden less those individuals who are not actually part of the problem, and yet still effectively advance its interests, the government must adopt that alternative. Of course, the government need not adopt a less burdensome alternative that would not effectively advance its compelling ends, as the government may burden individuals if “necessary” to achieve its ends.

With regard to the underinclusiveness inquiry, the statute must also be “necessary” to achieve its compelling government ends. This means that any unnecessary underinclusiveness will render the statute unconstitutional. Phrased in the affirmative, this means that the statute must be “directly related,” as well as “substantially” and “rationally” related, to achieving its ends. Only such a direct connection between means and ends, that is, to the extent possible directly linking all those who are the cause of a problem with the regulation, will satisfy the strict scrutiny underinclusiveness test.

The Court typically phrases this requirement in the negative, that is, by stating the statute must be “necessary” to advance the government’s compelling interest.26 However, the more positive way of phrasing this requirement – that there be a “direct relationship” between means and ends – seems easier to understand and apply in most circumstances. It is clear that the requirement of a direct relationship does exist at strict scrutiny. Commercial speech cases have always involved a less rigorous form of scrutiny than traditional First Amendment content-based regulations of speech, which trigger strict scrutiny. Yet, the Court has stated that statutes must be “directly related” to advancing the governmental ends under commercial speech doctrine of Central Hudson Gas & Electric Corp. v. Public Service Comm’n,27 excerpted at § 9.2 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3: THE FIRST AMENDMENT (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials). Since a “direct relationship” is required in commercial speech cases, a fortiori such a requirement is required at strict scrutiny.

Finally, since strict scrutiny is a more vigorous form of scrutiny than rational review or intermediate review, implicit in the requirement of a direct relationship is the requirement that the statute be rationally and substantially related to meeting the government ends as well. Thus, the best way to understand the Court’s equal protection analysis is to note that at rational basis review the statute must be rationally related to achieving legitimate interests and not impose an irrational burden; at

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26 See Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2422 (2013), citing Johnson v. California, 543 U.S. 499, 514 (2005), quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (“Under strict scrutiny, all racial classifications are categorically prohibited unless they are “necessary to further a compelling governmental interest” and ‘narrowly tailored to that end.’”).

intermediate scrutiny the statute must be rationally and substantially related to achieving important or substantial interests and not be substantially more burdensome than necessary; at strict scrutiny, the statute must be rationally, substantially, and directly related to achieving overriding or compelling interests and adopt the least restrictive or least burdensome alternative.

As indicated in the cases addressed in Chapters 20-22, under intermediate review and strict scrutiny, the government bears the burden of justifying its action, rather than the challenger bearing the burden of proving unconstitutionality under minimum rationality review, as noted at § 19.1 n.26. While “any conceivable interest” can be used to justify a statute at minimum rationality review, as noted at § 19.1 n.25, at intermediate review the government can only use “plausible” or “actual” government purposes to justify its action, as noted at § 22.3 nn.31-36. At strict scrutiny, the government can only use “actual” government purposes to meet its burden of satisfying strict scrutiny. 28

Given the myriad ways statutes might be drafted to respond to some problem, it is perhaps not surprising that governments have had a difficult time meeting strict scrutiny. Even if a compelling government interest exists, a court can often imagine some alternative statute that would be a less burdensome effective alternative to solving whatever problem exists. If such an alternative statute can be imagined, then the statute actually passed is not “necessary” to advance the government’s interest, and is declared unconstitutional. On the other hand, as the Court has often stated, strict scrutiny is not “‘strict in theory, but fatal in fact.’”29 Sometimes, strict scrutiny can be met.

In its phrasing of intermediate review, the Court has sometimes used the term “narrowly drawn” to reflect both the substantial relationship and not substantially more burdensome than necessary elements of intermediate scrutiny. In its phrasing of strict scrutiny, the Court has used the terms “precisely drawn” or “necessary” to reflect the fact that at strict scrutiny the statute must directly advance its ends and be the least restrictive effective means of doing so. 30 Unfortunately, sometimes the Supreme Court has used the phrase “narrowly drawn” under strict scrutiny. 31 To reflect the rigor

28 See Shaw v. Hunt, 517 U.S. 899, 908 (1996) (The state “must show” that its action “was in pursuit of a compelling state interest.”); id. at 908 n.4 (“To be a compelling interest, the State must show that the alleged objective was the legislature’s ‘actual purpose.’”).


of strict scrutiny analysis, and to separate this approach from the more flexible “substantially” narrowly drawn analysis of intermediate review, the terms “precisely tailored” or “necessary” are better terms to use than “narrowly tailored” for the strict scrutiny “least restrictive alternative” test. In the absence of definitive guidance from the Supreme Court, lower courts have used the phrase “narrowly drawn” for strict scrutiny, and “substantially related” for intermediate review, a practice consistent with the Supreme Court use, in 2000, in *Kimel v. Florida Board of Regents.*

Under current doctrine, statutes that on their face involve racial, ethnic, or national origin classifications automatically trigger a strict scrutiny approach. Prior to 1954, statutes or other government regulations that used a racial classification, but which applied equally to members of different races (typically white versus not-white in the statutes which were adopted), were held not to involve facial discrimination based on race and thus were viewed as social regulations triggering only minimum rationality review, as in *Plessy v. Ferguson,* excerpted at § 20.2. After 1954, any statute or government regulation that used a racial classification was held to involve facial discrimination based on race, as in *Loving v. Virginia,* excerpted at § 20.3, since race was used as a classification mechanism on the face of the statute or regulation. Statutes or government regulations which are neutral on their face, but which nonetheless were passed with a discriminatory intent on racial, ethnic, or national origin grounds, or are being so administered with such a discriminatory intent, trigger strict scrutiny, as addressed at § 20.4. If no such discriminatory intent can be proven, then the regulation is viewed as just another social regulation triggering minimum rationality review.

**§ 20.2 Pre-1954 Cases on Racial, Ethnic, or National Origin Facial Discrimination**

*Plessy v. Ferguson*

163 U.S. 537 (1896)

Justice BROWN delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts “that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.”

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By the second section it was enacted “that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.”

The petition for the writ of prohibition averred that petitioner was seven-eighth Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him; and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. State v. Gibson, 36 Ind. 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this court. Thus, in Strauder v. West Virginia, 100 U.S. 303 [(1879)], it was held that a law of West Virginia limiting to white male persons 21 years of age, and citizens of the state, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step towards reducing them to a condition of
servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty, and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. Virginia v. Rivers, 100 U.S. 313; Neal v. Delaware, 103 U.S. 370; Bush v. Com., 107 U.S. 110; Gibson v. Mississippi, 162 U.S. 565.

While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional.

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia . . . .

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People v. Gallagher, 93 N.Y. 438, 448 [(1883)]: “This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.” Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present
situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race (State v. Chavers, 5 Jones [N.C.] 1); others, that it depends upon the preponderance of blood (Gray v. State, 4 Ohio, 354; Monroe v. Collins, 17 Ohio St. 665); and still others, that the predominance of white blood must only be in the proportion of three-fourths (People v. Dean, 14 Mich. 406; Jones v. Com., 80 Va. 544). But these are questions to be determined under the laws of each state, and are not properly put in issue in this case.

Justice BREWER did not hear the argument or participate in the decision of this case.

Justice HARLAN dissenting.

Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors, and employees of railroad companies to comply with the provisions of the act.

Only “nurses attending children of the other race” are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of commodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.
It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, “the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment.” Sedg. St. & Const. Law, 324.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case.
The particular plaintiff in this case, Homer Plessy, was by all appearances white, as, in the Court’s words, “his one-eighth African blood” was “not discernable in him.” Plessy actually declared himself “colored” to the railroad conductor, triggering the statute’s application and setting up Plessy as a test case. At the time, Louisiana’s law declared anyone with more than “one drop” of non-white blood to be “colored,” but different states had different definitions of how much “blood” one had to have to be declared “colored,” from “one drop of blood” or 1/32 (the typical Southern standard), to 1/16 or 1/8 (in a number of Northern and Southern states), to, in a Northern state like Michigan, 1/4 non-white blood made the person “colored,” or in Ohio, a preponderance of blood test. Today, under race-based affirmative action programs, such as addressed at §§ 21.2-21.3, most states today permit individuals to self-report their racial identity, and depart from that self-identification only in clear cases of misrepresentation. The problem of racial identity is, of course, complicated today by the increasing number of individuals of mixed-race background.

Justice Harlan’s official position in Plessy was that treating citizens differently was inconsistent with “the guaranty given by the constitution to each state of a republican form of government” under the Guarantee Clause. That is why his phrasing, in the excerpt above, is that “all citizens are equal before the law.” By limiting his decision to protecting the rights of “citizens,” and not “persons” under an Equal Protection Clause analysis, Justice Harlan could observe in Plessy, “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.” This view had been reflected in the 1870 Naturalization Act which extended a right of naturalization to "aliens being free white persons, and to aliens of African nativity and to persons of African descent." For the drafters of that Act, the Chinese were "pagans" to whom oaths meant nothing and who had no sympathy for democracy. In contrast, America's black population were Christians and "wholly Americanized." The naturalization law's racial bias remained largely intact until 1952.


163 U.S. 537, 561-64 (1897) (Harlan, J., dissenting).

Korematsu v. United States
323 U.S. 214 (1944)

Justice BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a “Military Area”, contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, which provides that “. . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.”

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . .”

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a “protection against espionage and against sabotage.” In Kiyoshi Hirabayashi v. United States, 320 U.S. 81 [(1943)], we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.
The 1942 Act was attacked in the Hirabayashi case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as “assembly centers,” in order “to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration.” Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This
illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. Blockburger v. United States, 284 U.S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses.

The Endo case (Ex parte Mitsuye Endo), 323 U.S. 283 [, 302 (1943) (citizen whom the government concedes is loyal can no longer be detained)], graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers – and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies – we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress,
reposing its confidence in this time of war in our military leaders – as inevitably it must –
determined that they should have the power to do just this. . . . We cannot – by availing ourselves
of the calm perspective of hindsight – now say that at that time these actions were unjustified.

Justice ROBERTS, dissenting.

This is not a case of keeping people off the streets at night as was Kiyoshi Hirabayashi v. United
States, 320 U.S. 81 [(1943)], nor a case of temporary exclusion of a citizen from an area for his own
safety or that of the community, nor a case of offering him an opportunity to go temporarily out of
an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the
case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration
camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry
concerning his loyalty and good disposition towards the United States. If this be a correct statement
of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor
the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that
which is single and indivisible and thus make the case appear as if the petitioner violated a Military
Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily
to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military
Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed,
to be found within that zone unless he were in an Assembly Center located in that zone. General
DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of
Japanese makes it entirely clear, if it were necessary to refer to that document – and, in the light of
the above recitation, I think it is not – that an Assembly Center was a euphemism for a prison. No
person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring
criminal penalties, and that the only way he could avoid punishment was to go to an Assembly
Center and submit himself to military imprisonment, the petitioner did nothing.

Justice MURPHY, dissenting.

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific
Coast area on a plea of military necessity in the absence of martial law ought not to be approved.
Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of
racism.

It must be conceded that the military and naval situation in the spring of 1942 was such as to
generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and
espionage in that area. The military command was therefore justified in adopting all reasonable
means necessary to combat these dangers. In adjudging the military action taken in light of the then
apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group “were unknown and time was of the essence.” Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these “subversive” persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combating these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved – or at least for the 70,000 American citizens – especially when a large part of this number represented
children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights.

Justice JACKSON, dissenting.

A citizen's presence in the locality . . . was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four – the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole – only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.” Article 3, § 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.

. . . I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.
On the East Coast, the federal government established a similar exclusion zone. In *Ebel v. Drum*, 52 F. Supp. 189 (D.C. Mass 1943), the military exclusion order for the Eastern Area was held unconstitutional as applied to a German-American because, the district court concluded, there was not the same compelling interest regarding invasion or sabotage as in the Western Area in *Hirabayashi*. The individual was released, but the government did not appeal the decision, so no broader precedent was established. During World War II, the government eventually detained in internment camps more than 10,000 German-American citizens, persons of German descent who were in the United States or Latin America when war was declared, or similarly situated persons of Italian descent, many living and working in the United States for a number of years, but who had not yet been naturalized. Italian-American citizens were not detained. In 1993, the government apologized to Japanese-Americans for their internment, and awarded reparations of $20,000 per person for individuals still alive who had been interned. In 2000, the government apologized to the Italians who had been excluded, subject to a curfew, or detained. No similar apology has been made to Germans-American citizens or persons of German descent who were detained.

In *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), the Supreme Court unanimously repudiated the holding in *Korematsu*, indicating the case was “gravely wrong the day it was decided.” On the precise issue before the Court, the Court noted that the third version of the so-called “Trump travel ban” — denial of entry into the United States, subject to a waiver procedure, of nationals from six predominantly Muslim countries (Chad, Iran, Libya, Somalia, Syria, and Yemen) and also citizens of North Korea and certain government officials from Venezuela, subsequently slightly modified (Chad removed from the list) — was distinguishable from *Korematsu* as there was no racial, ethnic, or religious discrimination on the face of the ban. Thus strict scrutiny would only be applied if the challengers could prove the ban was adopted with discriminatory intent or involved discriminatory administration in practice. Eschewing the normal factor analysis to determine discriminatory intent, discussed in this Coursebook at § 20.4, the 5-4 Court majority said that because the case involved areas of traditional deference to the government (foreign policy/national security, see § 11.2 n.6, and immigration, see § 23.2.4 nn.24-26), the Court would apply only minimum rationality review. Under that standard, the Court said that, even considering President Trump’s anti-Muslim tweets, the ban could not be said to be based only on invidious “animus,” as the Court had found in *Romer v. Evans*, excerpted at § 19.2. The case was remanded to consider discriminatory administration in practice. Concurring, Justice Kennedy noted that even though it was proper for the Court to rule the travel ban constitutional, all government actors, including the President, have a constitutional obligation not to behave with racial, ethnic, religious, or other improper discriminatory intent. *Id.* at 2424 (Kennedy, J., concurring). Two Justices would have reinstated the lower court’s preliminary injunction while further evidence was developed about whether the travel ban, as applied during the preceding six months, indicated discriminatory administration. *Id.* at 2433 (Breyer, J., joined by Kagan, J., dissenting). Two Justices indicated that under traditional discriminatory intent analysis, including President Trump’s anti-Muslim tweets, discriminatory intent should have been found. *Id.* at 2433 (Ginsburg, J., joined by Sotomayor, J., dissenting). The first two broader versions of the travel ban, held unconstitutional by lower courts, are noted *id.* at 2418-22.
Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537 [(1896)]. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not “equal” and cannot be made “equal,” and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law
in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

The doctrine of “separate but equal” did not make its appearance in this court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the “separate but equal” doctrine in the field of public education. In Cumming v. Board of Education of Richmond County, 175 U.S. 528 [(1899)], and Gong Lum v. Rice, 275 U.S. 78 [(1927)], the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 [(1938)]; Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 [(1948)]; Sweatt v. Painter, 339 U.S. 629 [(1950)]; McLaurin v. Oklahoma State Regents, 339 U.S. 637 [(1950)]. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other “tangible” factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in
life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, supra (339 U.S. 629), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on “those qualities which are incapable of objective measurement but which make for greatness in a law school.” In *McLaurin v. Oklahoma State Regents*, supra (339 U.S. 637), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: “... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question – the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored.
to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. [FN13: 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment “(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? 5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b), (a) should this Court formulate detailed decrees in these cases; (b) if so, what specific issues should the decrees reach; (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?”]

The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

Cases ordered restored to docket for further argument on question of appropriate decrees. [That subsequent opinion in Brown v. Board of Education is addressed at § 21.1.]

An important aspect of Brown is that the decision was unanimous. This was not a foregone conclusion. Indeed, the case was initially heard in 1952, and after discussing the cases in conference in December 1952, the Court ordered reargument for the following year. One author has noted, “According to one account, four Justices – Black, Douglas, Burton, and Minton – indicated in conference that they would vote to end public school segregation, with Chief Justice Vinson and Justice Reed suggesting that they would vote to affirm Plessy. The remaining Justices – Frankfurter, Jackson, and Clark – were ambivalent.” Prior to the reargument, Chief Justice Vinson suffered a fatal heart attack, and President Eisenhower nominated Earl Warren as the Court's Chief Justice. He was subsequently confirmed by the Senate.

38 Brown v. Board of Education, 345 U.S. 972 (1953). On the main issue on reargument concerning the intent of the framers and ratifiers regarding public school segregation, see Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 949-55 (1995) (aspects of historical intent support Brown); Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1884-1914 (1995) (history does not support Brown, including noting that most schools at the time, including those in the District of Columbia, were in fact run on a segregated basis in 1868).

When Chief Justice Warren indicated his intent to vote to end public school segregation, the result in *Brown* became certain. A unanimous result, however, was not. The last holdout, Justice Reed, actually prepared a dissent in the case, which was never filed. Shortly after the *Brown* decision was announced, Justice Reed wrote a memo to Justice Frankfurter stating that the many considerations favoring segregation “did not add up to a balance against the Court’s opinion,” and that “the factors looking toward fair treatment for Negroes are more important than the weight of history.” It has also been noted, “*Brown*’s commitment to racial equality and human dignity legitimized participatory governance, handing the United States a crucial ideological advantage over the Soviet Union at the height of the Cold War,” and that perhaps this reason formed a crucial argument for Justice Reed, whose commitment to national security was well known.  

While the *Brown* decision was narrowly framed, probably for the tactical reason of a concern with public opinion if the Court challenged all state-supported segregation at one time, over the next few years the Court made it clear, often in summary *per curiam* decisions without oral argument, that any use of a racial classification in any context would be viewed as racial discrimination, and thus trigger the difficult-to-meet strict scrutiny review. Thus, the Court completely broke with the *Plessy* doctrine that “equal application” of racial classifications, including “separate but equal” statutes, did not constitute race discrimination. As indicated in the *Brown* Court’s discussion of the Holmesian-era cases of *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*, those cases did not break with *Plessy*, but merely did a real fact-based inquiry into whether the separate facilities were in fact “equal.” If they were unequal, the Court found that to be race discrimination. Only rarely did formalist-era courts look behind the literal equality stated in the statute or government regulation to find that, in fact, an inequality existed.

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*Brown v. Board of Education* represents a good example of the difference between the specific intent behind an idea versus broader, more general concepts. As discussed by Professor Ronald Dworkin

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41 *See, e.g.*, Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (*per curiam* decision, without oral argument, that law requiring segregation of public beaches and bathhouses unconstitutional); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (same as to public golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (same as to municipal bus system); Turner v. City of Memphis, 369 U.S. 350 (1962) (same as to public restaurants); Johnson v. Virginia, 373 U.S. 61 (1963) (same as to courtroom seating).

42 For a rare exception, *see* Buchanan v. Warley, 245 U.S. 60, 81-82 (1917) (Louisville city requirement of segregated blocks for residences invalid race discrimination).
conceptions are the specific, discrete ideas or examples held by individuals, while concepts are the broader, more abstract idea reflected in the conceptions. As elaborated by Professor Fallon, “One helpful division distinguishes between 'specific' or 'concrete' and 'general' or 'abstract' intent. Specific intent involves the relatively precise intent of the framers to control the outcomes of particular types of cases. . . . Abstract intent refers to aims that are defined as a higher level of generality, sometimes entailing consequences that the drafters did not specifically consider and that they might even have disapproved. An example comes from equal protection jurisprudence. The authors of the fourteenth amendment apparently did not specifically intend to abolish segregation in the public schools. Yet they did intend generally to establish a regime in which whites and blacks received equal protection of the laws – an aspiration than can be conceived, abstractly, as reaching far more broadly than the framers themselves specifically had intended.”

Thus, despite the fact that segregated schools were common in 1868, including in the District of Columbia, a Justice faithful to the general concept of equality placed into the 14th Amendment could hold, as in Brown, that segregated schools deny individuals equal protection of the laws. To the extent the framer and ratifiers of the 14th Amendment had natural law moral principles in mind, they would have intended to place into the 14th Amendment that general concept of equality, not to control later decisions by their specific historical practices.

During his confirmation hearing in 1989, Justice Souter described this approach as following the "original meaning" of the Constitution, rather than following the framers and ratifiers' specific original intent. Justice Souter stated, "[Justices ought to identify the] principle that was intended to be established as opposed simply to the specific application that the particular provision was meant to have by, and that was in the minds of, those who proposed and framed and adopted that provision in the first place." Similarly, Justice Ruth Bader Ginsburg noted during her confirmation hearing, that the general concept of equality in the Declaration of Independence and the Equal Protection Clause of the 14th Amendment is broad enough to embody a principle of equal rights for women, despite the fact that the specific views of Thomas Jefferson and others in the 18th and 19th century were not ready for women to be equal participants in public life. During her confirmation hearing, Justice Ginsburg quoted Jefferson that "[t]he appointment of women to public office is an innovation for which the public is not prepared, nor am I." Nevertheless, as Justice Ginsburg noted, she presumed that if Jefferson were alive today he would have a different specific view on the role of women in public life based on the general concept of equality in which Jefferson believed – each individual's equal and unalienable right to "life, liberty, and the pursuit of happiness."

43 See RONALD DWORKIN, LAW'S EMPIRE 71 (1986).


45 David H. Souter, Confirmation Hearings, cited in David J. Garrow, Justice Souter: A Surprising Kind of Conservative, N.Y. Times, September 25, 1994, sec. 6 (Magazine), at 52.

Chief Justice WARREN delivered the opinion of the Court.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. [FN5: After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama; Arkansas; Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia (citations omitted). Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948).] Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a “white person” marrying other than another “white person,” a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of “racial composition” to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In Naim, the state court concluded that the State's legitimate purposes were “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride,” obviously an endorsement of the doctrine of White Supremacy. Id., at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, . . . marriage should be left to exclusive state control by the Tenth Amendment.
While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, Maynard v. Hill, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of Meyer v. State of Nebraska, 262 U.S. 390 (1923), and Skinner v. State of Oklahoma, 316 U.S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.

The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. . . . In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that the pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources “cast some light” they are not sufficient to resolve the problem; “[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’ Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.” Brown v. Board of Education of Topeka, 347 U.S. 483, 489 (1954). See also Strauder v. State of West Virginia, 100 U.S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures
which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. McLaughlin v. State of Florida, 379 U.S. 184 (1964) [law punishing “negro man and white women, or any white man and negro woman” who occupy same room in the nighttime unconstitutional].

The State finds support for its “equal application” theory in the decision of the Court in Pace v. State of Alabama, 106 U.S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated “Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.” McLaughlin v. Florida, supra, 379 U.S. at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. Slaughter-House Cases, 16 Wall. 36, 71 (1873); Strauder v. State of West Virginia, 100 U.S. 303, 307-308 (1880); Ex parte Virginia, 100 U.S. 339, 344-345 (1880); Shelley v. Kraemer, 334 U.S. 1, (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.” Hirabayashi v. United States, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” Korematsu v. United States, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they “cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.” McLaughlin v. Florida, supra, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.
As phrased by the Court, there is not only no overriding purpose to support this statute under strict scrutiny, but banning marriages based on animus towards interracial couples is not even a legitimate interest. Thus, this statute fails even minimum rationality review based on the post-1954 view that animus is illegitimate, even if it reflects historical or traditional attitudes, as discussed at § 19.1 nn.30-36. While a specific historical intent formalist might support the state court in Naim, a textual formalist, like Justices Scalia and Thomas, would support the Loving result on the grounds that the text of the Equal Protection Clause bans racial discrimination without regard to historical practices.47

The Court has made it clear that strict scrutiny review applies to any use of a racial classification, even in area of traditional deference to government, like prison administration. In 2005, the Court was presented with a California prison administration policy of racially segregating prisoners for up to 60 days each time a prisoner initially enters a correctional facility. The state’s justification for this practice was to reduce gang violence among gangs of different races. The Court said in Johnson v. California:

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." . . . Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002) (in a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated").48

Dissenting, Justice Thomas, joined by Justice Scalia, would have applied rational basis scrutiny based on the deference toward prison administrators. They were worried that the Court’s intruding on prison administrator policy would increase “interracial murders and assaults among inmates perpetrated by these gangs.”49 Faced with having to defend its policy under strict scrutiny review following Johnson, California altered its policy with no measurable increase in gang violence.

47 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 980 n.1 (1992) (supporting Loving on textual grounds; this view would also support Brown despite historical evidence on segregated schools in 1868). For an example of a specific historical intent view rejecting the result in Brown, see RAOUl BERGER, GOVERNMENT BY JUDICIARY 22-24, 27, 117-21, 123-27, 363-72 (1977).

48 543 U.S. 499, 507-08 (2005); id. at 515 (Rehnquist, C.J., took no part in the decision).

49 Id. at 533-34 (Thomas, J., joined by Scalia, J., dissenting),
§ 20.4 Proving Discriminatory Intent or Purpose in Facially Neutral Laws

During the formalist era, in the few cases where the Court struck down laws for discrimination on the basis of race where the statute on its face was neutral, the discrimination was clearly intentional and was often labeled, as in *Yick Wo v. Hopkins*,\(^{50}\) excerpted below at § 20.4, to be based on "hostility" to the race. During the Holmesian era, when the Court began to address race discrimination in the context of participation in the justice system, such as service on a jury, the Court spoke in *Akins v. Texas* of "intentional discrimination."\(^{51}\) In the instrumentalist era, when the Court began to address discrimination in public education and other public facilities, the Court spoke in *Keyes v. School District No. 1* of tracing laws to a racially discriminatory “intent.”\(^{52}\) However, not until 1976 did the Court squarely face the question of whether race discrimination exists under the Equal Protection Clause if a law has a neutral purpose, but disproportionate racial effects.

That was the issue in *Washington v. Davis*,\(^{53}\) excerpted below at § 20.4. In *Davis*, the Court held that, when the law is neutral on its face, finding race discrimination under the Fifth or 14th Amendment depends upon tracing government action to a racially discriminatory purpose or intent. If such an “invidious” intent is found, strict scrutiny will be invoked. Without such intent, a differential impact is given only rational basis scrutiny. The same doctrine applies to any suspect class, like ethnicity or national origin. Similarly, for quasi-suspect classes, like gender, either facial discrimination or discriminatory intent will trigger intermediate review.\(^{54}\)

Although precedents are not clear, the doctrine from *Palmer v. Thompson*\(^{55}\) in 1971 seems to be that both a discriminatory effect and a showing of intent are necessary to trigger heightened scrutiny. The Court noted in *Palmer* that no case “has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.” On the other hand, the logic of the doctrine seems to suggest that if discriminatory intent is proven, that is sufficient. This issue has little practical significance, however, since if no discriminatory effects exist, there will be a problem with standing. In the absence of discriminatory effects, the plaintiffs might have a stigmatic injury based on racial motives, but that would be insufficient under *Allen v. Wright*, excerpted at § 3.2.

Factors relevant for finding discriminatory intent or purpose – the Court has used those two terms interchangeably – were detailed in 1977 in *Village of Arlington Heights v. Metropolitan Housing*

\(^{50}\) 118 U.S. 356, 373-74 (1886).

\(^{51}\) 325 U.S. 398, 403 (1945).

\(^{52}\) 413 U.S. 189, 198-200 (1973)


\(^{54}\) *See* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271-73 (1979).

Discriminatory intent implies more than awareness of consequences. It implies that the action was taken at least in part “because of,” not merely “in spite of,” its adverse effects on a group. Thus, the ability to foresee disparate impact as a consequence of a law does not, without more, trigger a finding of discriminatory intent. On the other hand, a court will consider whether a state adheres to a particular policy or practice with knowledge that it will have a discriminatory effect. If a prima facie case is made of discriminatory intent, the burden then shifts to the government to establish that the same decision would have been made even if the impermissible purpose had not been considered. If the government fails to meet this burden, strict scrutiny review is triggered.

Yick Wo v. Hopkins
118 U.S. 356 (1886)

[Ed.: The ordinances of the city of San Francisco give the board of supervisors authority, at their discretion, to refuse permission to carry on laundries, except where located in buildings of brick or stone. This was done ostensibly as a fire-prevention measure. The board, however, can waive the requirement and allow laundries in wooden buildings to operate. The appellants applied for and were refused permission, and thereafter they were sentenced to imprisonment under the ordinance, which provided for punishment by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment. Waivers were granted to 80-odd laundries in wooden buildings. All the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted. Petitioner and 200 of his Chinese

57 Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (law granting veterans a preference in civil service hiring upheld, even though all knew it would advantage more men than women, because it was passed to help returning veterans return to civilian life).
countrymen similarly situated petitioned for permission to continue their business in wooden houses which they had been using for laundries for more than twenty years, and such petitions were denied.]

Justice MATTHEWS delivered the opinion of the court.

The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: “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.” These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U.S. 259; Chy Luny v. Freeman, 92 U.S. 275; Ex parte Virginia, 100 U.S. 339; Neal v. Delaware, 103 U.S. 370; and Soon Hing v. Crowley, 113 U.S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal . . . . The imprisonment of the petitioners is therefore illegal, and they must be discharged.

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Washington v. Davis
426 U.S. 229 (1976)

Justice WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on “Test 21,” which is “an examination that is used generally throughout the federal service,” which “was developed by the Civil Service Commission, not the Police Department,” and which was “designed to test verbal ability, vocabulary, reading and comprehension.” Id., at 16.

. . . Respondents' evidence, the District Court said, warranted three conclusions: “(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. [Ed.: “[F]rom 1968-71, 57% of African-Americans failed the test, compared with 13% of whites.” 512 F.2d 956, 958-59 (D.C. Cir. 1975)] (c) The Test has not been validated to establish its reliability for measuring subsequent job performance.” Ibid. This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was “satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates . . . to discriminate against otherwise qualified blacks” Id., at 17. It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance.” The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process.” Ibid. The District Court ultimately concluded that “[t]he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability” and that the Department “should not be required on this showing to lower standards or to abandon efforts to achieve excellence.” Id., at 18.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of
The Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Almost 100 years ago, Strauder v. West Virginia, 100 U.S. 303 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. “A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurors of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.” Akins v. Texas, 325 U.S. 398, 403-404 (1945). A defendant in a criminal case is entitled “to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice.” Alexander v. Louisiana, 405 U.S. 625, 628-629 (1972).

The rule is the same in other contexts. Wright v. Rockefeller, 376 U.S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature “was either motivated by racial considerations or in fact drew the districts on racial lines”; the plaintiffs had not shown that the statute “was the product of a state contrivance to segregate on the basis of race or place of origin.” Id., at 56, 58. The dissenters were in agreement that the issue was whether the “boundaries . . . were purposefully drawn on racial lines.” Id., at 67.

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of De jure segregation is “a current condition of segregation resulting from intentional state action. Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973). The differentiating factor between De jure segregation and so-called De facto segregation . . . is Purpose or Intent to segregate.” Id., at 208. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because “[t]he acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be.” Jefferson v. Hackney, 406 U.S. 535, 548 (1972). And compare Hunter v. Erickson, 393 U.S. 385 (1969), with James v. Valtierra, 402 U.S. 137 (1971).

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact in the jury cases for example,
the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that “a police officer qualifies on the color of his skin rather than ability.” 348 F.Supp., at 18.

[Ed.: The Court also concluded that use of “Test 21” did not violate Title VII of the 1964 Civil Rights Act banning racial discrimination in employment]

Justice STEWART joins Parts I and II of the Court's opinion [Ed.: All the above language regarding Equal Protection Clause analysis, but not regarding Title VII].

Justice STEVENS, concurring.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in Gomillion v. Lightfoot, 364 U.S. 339 (1960) [Ed.: local act altered shape of a city from a
square to a 28-sided figure and has as its effect removal from the city of all but four or five of its 400 African-American voters, although not removing a single white voter] or Yick Wo v. Hopkins, 118 U.S. 356 [(1886)] [Ed.: excerpted above], it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

[Ed.: Concluding use of “Test 21" did violate Title VII, and thus avoiding the constitutional issue]

Regarding Title VII, the Supreme Court noted in 2009 in Ricci v. Destefano:60

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII prohibits both intentional discrimination (known as “disparate treatment”) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as “disparate impact”).

As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact. But in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are “discriminatory in operation.” Id., at 431. The Griggs Court stated that the “touchstone” for disparate-impact liability is the lack of “business necessity”: If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited.” Ibid.; see also id., at 432 (employer's burden to demonstrate that practice has “a manifest relationship to the employment in question”); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Under those precedents, if an employer met its burden by showing that its practice was job related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination. Ibid. (allowing complaining party to show “that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest”).

Twenty years after Griggs, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. . . . Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is job related for the position in

question and consistent with business necessity.” Ibid. Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. §§ 2000e 2(k)(1)(A)(ii) and (C).

For this reason, where Title VII applies, it provides greater protection for plaintiffs challenging practices that cause racially discriminatory effects in employment, and thus is the primary focus of litigation in this area, not the Equal Protection Clause.

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Village of Arlington Heights v. Metropolitan Housing Development Corp.
429 U.S. 252 (1977)

Justice POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois. They alleged that the denial was racially discriminatory and that it violated, inter alia, the Fourteenth Amendment and the Fair Housing Act of 1968, 82 Stat. 81, 42 U.S.C. § 3601 et seq. Following a bench trial, the District Court entered judgment for the Village, 373 F.Supp. 208 (1974), and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the “ultimate effect” of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. 517 F.2d 409 (1975). We granted the Village's petition for certiorari, 423 U.S. 1030, (1975), and now reverse.

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east the Viatorian property directly adjoins the backyards of other single-family homes.
The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under § 236 of the National Housing Act, 48 Stat. 1246, as added and amended, 12 U.S.C. § 1715z-1.

MHDC is such a developer. It was organized in 1968 by several prominent Chicago citizens for the purpose of building low- and moderate-income housing throughout the Chicago area. In 1970 MHDC was in the process of building one § 236 development near Arlington Heights and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

After some negotiation, MHDC and the Order entered into a 99-year lease and an accompanying agreement of sale covering a 15-acre site in the southeast corner of the Viatorian property. MHDC became the lessee immediately, but the sale agreement was contingent upon MHDC's securing zoning clearances from the Village and § 236 housing assistance from the Federal Government. If MHDC proved unsuccessful in securing either, both the lease and the contract of sale would lapse. The agreement established a bargain purchase price of $300,000, low enough to comply with federal limitations governing land-acquisition costs for § 236 housing.

MHDC engaged an architect and proceeded with the project, to be known as Lincoln Green. The plans called for 20 two-story buildings with a total of 190 units, each unit having its own private entrance from outside. One hundred of the units would have a single bedroom, thought likely to attract elderly citizens. The remainder would have two, three, or four bedrooms. A large portion of the site would remain open, with shrubs and trees to screen the homes abutting the property to the east.

The planned development did not conform to the Village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple-family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under § 236.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the “social issue” the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate-income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer
between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village's Board of Trustees that it deny the request. The motion stated: “While the need for low and moderate income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location.” Two members voted against the motion and submitted a minority report, stressing that in their view the change to accommodate Lincoln Green represented “good zoning.” The Village Board met on September 28, 1971, to consider MHDC's request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.” Id., at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts. E.g., *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973) (schools); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (election districting); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945) (jury selection).

*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it “bears more heavily on one race than another,” *Washington v. Davis*, supra, 426 U.S., at 242, may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.
The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See Lane v. Wilson, supra; Griffin v. School Board, 377 U.S. 218 (1964); Davis v. Schnell, 81 F.Supp. 872 (S.D.Ala.), aff'd per curiam, 336 U.S. 933 (1949); cf. Keyes v. School Dist. No. 1, Denver, Colo., supra, 413 U.S., at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. Reitman v. Mulkay, 387 U.S. 369, 373-376 (1967); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Nixon, 418 U.S. 683, 705 (1974); 8 J. Wigmore, Evidence s 2371 (McNaughton rev.ed. 1961).

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

IV

The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion. The area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures. The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.
In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. [FN21: Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274.] This conclusion ends the constitutional inquiry.

Justice STEVENS took no part in the consideration or decision of this case.

Justice MARSHALL, with whom Justice BRENNAN joins, concurring in part and dissenting in part.

I concur in Parts I-III of the Court's opinion. However, I believe the proper result would be to remand this entire case to the Court of Appeals for further proceedings consistent with Washington v. Davis, 426 U.S. 229 (1976), and today's opinion. The Court of Appeals is better situated than this Court both to reassess the significance of the evidence developed below in light of the standards we have set forth and to determine whether the interests of justice require further District Court proceedings directed toward those standards.

Justice WHITE, dissenting.

The Court reverses the judgment of the Court of Appeals because it finds, after re-examination of the evidence supporting the concurrent findings below, that “[r]espondents . . . failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.” Ante, p. 566. The Court reaches this result by interpreting our decision in Washington v. Davis, 426 U.S. 229 (1976), and applying it to this case, notwithstanding that the Court of Appeals rendered its decision in this case before Washington v. Davis was handed down, and thus did not have the benefit of our decision when it found a Fourteenth Amendment violation.

The Court gives no reason for its failure to follow our usual practice in this situation of vacating the judgment below and remanding in order to permit the lower court to reconsider its ruling in light of our intervening decision. The Court's articulation of a legal standard nowhere mentioned in Davis indicates that it feels that the application of Davis to these facts calls for substantial analysis. . . . Given that the Court deems it necessary to re-examine the evidence in the case in light of the legal standard it adopts, a remand is especially appropriate. As the cases relied upon by the Court indicate, the primary function of this Court is not to review the evidence supporting findings of the lower courts. See, e.g., Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964).
A further justification for remanding on the constitutional issue is that a remand is required in any event on respondents' Fair Housing Act claim, 42 U.S.C. § 3601 et seq., not yet addressed by the Court of Appeals. While conceding that a remand is necessary because of the Court of Appeals' "unorthodox" approach of deciding the constitutional issue without reaching the statutory claim, ante, at 566, the Court refuses to allow the Court of Appeals to reconsider its constitutional holding in light of *Davis* should it become necessary to reach that issue.

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**Rogers v. Lodge**  
*458 U.S. 613 (1982)*

Justice WHITE delivered the opinion of the Court.

The issue in this case is whether the at-large system of elections in Burke County, Ga., violates the Fourteenth Amendment rights of Burke County's black citizens.

Burke County is a large, predominately rural county located in eastern Georgia. Eight hundred and thirty-one square miles in area, it is approximately two-thirds the size of the State of Rhode Island. According to the 1980 census, Burke County had a total population of 19,349, of whom 10,385, or 53.6%, were black. The average age of blacks living there is lower than the average age of whites and therefore whites constitute a slight majority of the voting age population. As of 1978, 6,373 persons were registered to vote in Burke County, of whom 38% were black.

The Burke County Board of Commissioners governs the county. It was created in 1911, see 1911 Ga. Laws 310-311, and consists of five members elected at large to concurrent 4-year terms by all qualified voters in the county. The county has never been divided into districts, either for the purpose of imposing a residency requirement on candidates or for the purpose of requiring candidates to be elected by voters residing in a district. In order to be nominated or elected, a candidate must receive a majority of the votes cast in the primary or general election, and a runoff must be held if no candidate receives a majority in the first primary or general election. Ga. Code § 34-1513 (Supp.1980). Each candidate must run for a specific seat on the Board, Ga. Code § 34–1015 (1978), and a voter may vote only once for any candidate. No Negro has ever been elected to the Burke County Board of Commissioners.

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines. While multimember districts have been challenged for "their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party," *Whitcomb v. Chavis*, 403 U.S. 124, 158-159 (1971), this Court has repeatedly held that they are not unconstitutional *per se*. *Mobile v. Bolden*, supra, 446 U.S., at 66; *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb*...
The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if “conceived or operated as purposeful devices to further racial discrimination” by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population. Whitcomb v. Chavis, supra, 403 U.S., at 149. See also White v. Regester, supra, 412 U.S., at 765. Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases. Washington v. Davis, 426 U.S. 229 (1976), and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), made it clear that in order for the Equal Protection Clause to be violated, “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” Washington v. Davis, supra, 426 U.S., at 240. Neither case involved voting dilution, but in both cases the Court observed that the requirement that racially discriminatory purpose or intent be proved applies to voting cases by relying upon, among others, Wright v. Rockefeller, 376 U.S. 52 (1964), a districting case, to illustrate that a showing of discriminatory intent has long been required in all types of equal protection cases charging racial discrimination. Arlington Heights, supra, 429 U.S., at 265; Washington v. Davis, supra, 426 U.S., at 240.

We are also unconvinced that we should disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population. In White v. Regester, 412 U.S., at 769-770, we stated that we were not inclined to overturn the District Court's factual findings, “representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.” See also Columbus Board of Education v. Penick, 443 U.S. 449, 468 (1979) (Burger, C.J., concurring in judgment). Our recent decision in Pullman-Standard v. Swint, 456 U.S. 273 (1982), emphasizes the deference Federal Rule of Civil Procedure 52 requires reviewing courts to give a trial court's findings of fact. “Rule 52a broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. . . .” 456 U.S. at 287. The Court held that the issue of whether the differential impact of a seniority system resulted from an intent to discriminate on racial grounds “is a pure question of fact, subject to Rule 52a's clearly-erroneous standard.” Id., at 287-288. The Swint Court also noted that issues of intent are commonly treated as factual matters. Id., at 288. We are of the view that the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact. The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See, e.g., Berenyi v. Information Director, 385 U.S. 630, 635 (1967); Blau v. Lehman, 368 U.S. 403, 408-409 (1962); Graver Tank & Mfg. Co. v. Linde Co., 336 U.S. 271, 275(1949). We agree with the Court of Appeals that on the record before us, none of the factual findings are clearly erroneous.

The District Court found that blacks have always made up a substantial majority of the population in Burke County, App. to Juris. Statement 66a, n.3, but that they are a distinct minority of the registered voters. Id., at 71a-72a. There was also overwhelming evidence of bloc voting along racial lines. Id., at 72a-73a. Hence, although there had been black candidates, no black had ever been
elected to the Burke County Commission. These facts bear heavily on the issue of purposeful discrimination. Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion. See White v. Regester, supra, [412 U.S.] at 766.

Under our cases, however, such facts are insufficient in themselves to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice. United Jewish Organizations v. Carey, 430 U.S. 144, 167 (1977); White v. Regester, supra, at 765-766; Whitcomb v. Chavis, 403 U.S., at 149-150. See also Mobile v. Bolden, 446 U.S., at 66 (plurality opinion). Both the District Court and the Court of Appeals thought the supporting proof in this case was sufficient to support an inference of intentional discrimination. The supporting evidence was organized primarily around the factors which Nevett v. Sides, 571 F.2d 209 (CA5 1978), had deemed relevant to the issue of intentional discrimination. These factors were primarily those suggested in Zimmer v. McKeithen, 485 F.2d 1297 (CA5 1973).

The District Court began by determining the impact of past discrimination on the ability of blacks to participate effectively in the political process. Past discrimination was found to contribute to low black voter registration, because prior to the Voting Rights Act of 1965, blacks had been denied access to the political process by means such as literacy tests, poll taxes, and white primaries. The result was that “Black suffrage in Burke County was virtually non-existent.” App. to Juris. Statement 71a. Black voter registration in Burke County has increased following the Voting Rights Act to the point that some 38% of blacks eligible to vote are registered to do so. Id., at 72a. On that basis the District Court inferred that “past discrimination has had an adverse effect on black voter registration which lingers to this date.” Ibid. Past discrimination against blacks in education also had the same effect. Not only did Burke County schools discriminate against blacks as recently as 1969, but also some schools still remain essentially segregated and blacks as a group have completed less formal education than whites. Id., at 74a.

The District Court found further evidence of exclusion from the political process. Past discrimination had prevented blacks from effectively participating in Democratic Party affairs and in primary elections. Until this lawsuit was filed, there had never been a black member of the County Executive Committee of the Democratic Party. There were also property ownership requirements that made it difficult for blacks to serve as chief registrar in the county. There had been discrimination in the selection of grand jurors, the hiring of county employees, and in the appointments to boards and committees which oversee the county government. Id., at 74a–76a. The District Court thus concluded that historical discrimination had restricted the present opportunity of blacks effectively to participate in the political process. Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.
Extensive evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community, which increases the likelihood that the political process was not equally open to blacks. This evidence ranged from the effects of past discrimination which still haunt the county courthouse to the infrequent appointment of blacks to county boards and committees; the overtly discriminatory pattern of paving county roads; the reluctance of the county to remedy black complaints, which forced blacks to take legal action to obtain school and grand jury desegregation; and the role played by the County Commissioners in the incorporation of an all-white private school to which they donated public funds for the purchase of band uniforms. Id., at 77a-82a.

The District Court also considered the depressed socio-economic status of Burke County blacks. It found that proportionately more blacks than whites have incomes below the poverty level. Id., at 83a. Nearly 53% of all black families living in Burke County had incomes equal to or less than three-fourths of a poverty-level income. Ibid. Not only have blacks completed less formal education than whites, but also the education they have received “was qualitatively inferior to a marked degree.” Id., at 84a. Blacks tend to receive less pay than whites, even for similar work, and they tend to be employed in menial jobs more often than whites. Id., at 85a. Seventy-three percent of houses occupied by blacks lacked all or some plumbing facilities; only 16% of white-occupied houses suffered the same deficiency. Ibid. The District Court concluded that the depressed socio-economic status of blacks results in part from “the lingering effects of past discrimination.” Ibid.

Although finding that the state policy behind the at-large electoral system in Burke County was “neutral in origin,” the District Court concluded that the policy “has been subverted to invidious purposes.” Id., at 90a. As a practical matter, maintenance of the state statute providing for at-large elections in Burke County is determined by Burke County's state representatives, for the legislature defers to their wishes on matters of purely local application. The court found that Burke County's state representatives “have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.” Ibid.

The trial court considered, in addition, several factors which this Court has indicated enhance the tendency of multimember districts to minimize the voting strength of racial minorities. See Whitcomb v. Chavis, 403 U.S., at 143-144. It found that the sheer geographic size of the county, which is nearly two-thirds the size of Rhode Island, “has made it more difficult for Blacks to get to polling places or to campaign for office.” App. to Juris. Statement 91a. The court concluded, as a matter of law, that the size of the county tends to impair the access of blacks to the political process. Id., at 92a. The majority vote requirement, Ga. Code § 34-1513 (Supp.1980), was found “to submerge the will of the minority” and thus “deny the minority's access to the system.” App. to Juris. Statement 92a. The court also found the requirement that candidates run for specific seats, Ga. Code § 34-1015 (1978), enhances appellee's lack of access because it prevents a cohesive political group from concentrating on a single candidate. Because Burke County has no residency requirement, “[a]ll candidates could reside in Waynesboro, or in ‘lilly-white’ [sic] neighborhoods. To that extent, the denial of access becomes enhanced.” App. to Juris. Statement 93a.
None of the District Court's findings underlying its ultimate finding of intentional discrimination appears to us to be clearly erroneous; and as we have said, we decline to overturn the essential finding of the District Court, agreed to by the Court of Appeals, that the at-large system in Burke County has been maintained for the purpose of denying blacks equal access to the political processes in the county. As in White v. Regester, 412 U.S., at 767, the District Court's findings were "sufficient to sustain [its] judgment . . . and, on this record, we have no reason to disturb them."

Justice POWELL, with whom Justice REHNQUIST joins, dissenting.

Mobile v. Bolden, 446 U.S. 55 (1980), establishes that an at-large voting system must be upheld against constitutional attack unless maintained for a discriminatory purpose. In Mobile we reversed a finding of unconstitutional vote dilution because the lower courts had relied on factors insufficient as a matter of law to establish discriminatory intent. See id., at 73 (plurality opinion of Stewart, J.). The District Court and Court of Appeals in this case based their findings of unconstitutional discrimination on the same factors held insufficient in Mobile. Yet the Court now finds their conclusion unexceptionable. The Mobile plurality also affirmed that the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant." Id., at 74, n.20. Although the courts below did not answer that question in this case, the Court today affirms their decision.

Whatever the wisdom of Mobile, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But Mobile held that this kind of evidence was not enough. Such evidence, we found in Mobile, did not merely fall short, but "fell far short[,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial . . . discrimination.'" Id., at 70 (emphasis added), quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971).

The Court's decision today relies heavily on the capacity of the federal district courts – essentially free from any standards propounded by this Court – to determine whether at-large voting systems are "being maintained for the invidious purpose of diluting the voting strength of the black population." Ante, at 3278. Federal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments. Inquiries of this kind not only can be "unseemly," see Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L.Rev. 1163, 1164 (1978); they intrude the federal courts – with only the vaguest constitutional direction – into an area of intensely local and political concern.

Justice STEVENS, dissenting.

Our legacy of racial discrimination has left its scars on Burke County, Georgia. The record in this case amply supports the conclusion that the governing officials of Burke County have repeatedly denied black citizens rights guaranteed by the Fourteenth and Fifteenth Amendments to the Federal Constitution. No one could legitimately question the validity of remedial measures, whether legislative or judicial, designed to prohibit discriminatory conduct by public officials and to guarantee that black citizens are effectively afforded the rights to register and to vote.

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[However, a] rule that would invalidate all governmental action motivated by racial, ethnic, or political considerations is too broad. . . . The Hasidic Jews in Kings County, N.Y., the Puerto Ricans in Chicago, the Spanish-speaking citizens in Dallas, the Bohemians in Cedar Rapids, the Federalists in Massachusetts, the Democrats in Indiana, and the Republicans in California have all been disadvantaged by deliberate political maneuvers by the dominant majority. . . . But if a political majority's intent to maintain control of a legitimate local government is sufficient to invalidate any electoral device that makes it more difficult for a minority group to elect candidates – regardless of the nature of the interest that gives the minority group cohesion – the Court is not just entering a “political thicket”; it is entering a vast wonderland of judicial review of political activity.

During the 1970s and 1980s, a number of cases raised issues like those addressed in Rogers v. Lodge. This was because minorities were registering and voting in greater numbers in the aftermath of Civil Rights Movement in the 1960s, and in particular the Voting Rights Act of 1965, which substantially outlawed a number of practices, like literacy tests, which had been used to limit minority voting. At the same time, while the number of white voters in many medium-size and large-size cities were decreasing, due to “white flight” to the suburbs, spurred in part by a desire to avoid sending their children to integrated public schools in the wake of Brown v. Board of Education, enough white voters remained so that various political maneuvers – like moving from district elections to at-large elections or changing city boundaries – could make a difference in maintaining white political power. By the 1990s, enough white voters had moved to the suburbs, so that in most cities minority candidates began to be elected in greater numbers to council seats, mayoral positions, and other elective posts, such as state house, state senate, and House of Representative position from city districts. Today, whether a city has at-large elections, district elections, or a combination of the two – for example, the city of Houston, Texas elects 9 members to the city council based on districts, and 6 additional members based on at-large election – makes little difference in terms of minority representation.

The more contemporary concern is whether state redistricting of state house and senate seats, and congressional redistricting for the House of Representatives, are being done in a way to dilute minority voting strength. Under the Voting Rights Act of 1965, certain districts with a history of diluting minority voting strength – mostly in the South – were required to get special “preclearance” of any changes in their districting practices from the Department of Justice. In Shelby County, Alabama v. Holder,61 a 5-4 Court decided in 2013 that the preclearance requirement of § 5 was unconstitutional, because the formula used to determine which jurisdictions are covered was based on data over 40 years old. Since the Act “imposes current burdens” it “must be justified by current needs,” not needs based on outdated figures. The ability of parties, or the federal government, to bring suit under § 2 of the Voting Rights Act for voting regulations having a disparate impact on race, by proving discriminatory intent, as in Rogers v. Lodge, or to bring an action under Crawford
for denying an individual the right to vote under an Equal Protection analysis, addressed at § 24.3, was left unimpaired by the decision. For those jurisdictions that were subject to the preclearance requirement, rather than have the decision on validity of a voting regulation made by the Justice Department under a preclearance process, it will now be made by courts, as it has been made before Shelby County in the vast majority of states not covered by the preclearance requirement.

In 2006, in League of United Latin American Citizens v. Perry, Justice Kennedy joined with Justices Stevens, Souter, Ginsburg and Breyer to hold that one district in a Texas redistricting plan adopted in 2003 did have an impermissible effect of discriminating against Hispanic voters, and thus violated § 2 of the Voting Rights Act. Dissenting from this conclusion, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, would have held that all the districts in the Texas redistricting plan were based upon political gerrymandering considerations intended to increase the likelihood of Republicans being elected to Congress, and, as such, did not violate § 2 of the Voting Rights Act’s concern with diluting minority voting strength.

With respect to criminal laws and voting, an unanimous Court held in Hunter v. Underwood that Section 182 of the Alabama Constitution, adopted in 1901, which disenfranchised persons convicted of a crime involving moral turpitude, was enacted for the purpose of disenfranchising African-Americans and had achieved that effect 10 times as often as for whites. The law was not saved by its additional purpose of discriminating against poor whites.

A similar concern with laws passed during the segregationist era caused a fractured Court in Furman v. Georgia to require that any death penalty statute had to provide clearly specific crimes for which the death penalty could be imposed and factors to be weighed and procedures to be followed in deciding when to impose the death penalty. In practice, this required virtually every state to rethink its death penalty laws. Four years later, in response to Furman, the Court noted in Gregg v. Georgia, “The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. . . . [A]ll of the post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.”

62 126 S. Ct. 2594, 2612-23 (2006); id. at 2652-53 (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 2663-69 (Scalia, J., joined by Thomas, J., and joined in Part III by Roberts, C.J., and Alito, J., concurring in the judgment in part and dissenting in part).


64 408 U.S. 238 (1972) (per curiam opinion) (five Justices wrote concurring opinions and four Justices wrote dissenting opinions in the case).

Since Furman, only instrumentalist Justices have concluded that the death penalty constitutes cruel and unusual punishment in all circumstances. The remainder of the Court has upheld the death penalty for certain categories of murder, provided appropriate heightened procedural safeguards are met in the trying of such capital cases. While the international trend is clearly in the direction of abolition of the death penalty, it is likely the death penalty will remain constitutional in the United States for the foreseeable future, based upon arguments of history, legislative and executive practice, long-standing precedents, and what has been called a “distinctive American faith” in the procedural protections afforded defendants, a faith which is strong despite increasing evidence through DNA testing that innocent persons are put on death row.

Challenges to the death penalty based on discriminatory application against minority groups have inevitably failed. For example, in McCleskey v. Kemp, statistical evidence that the death penalty was being applied with racially discriminatory effects in Georgia, with the death penalty “assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims” was not enough to establish a prima facie case of racial discrimination absent other evidence that the death penalty procedures adopted by the state were adopted with an intent to discriminate on grounds of race. The statistics in other states conform to those presented in the Baldus study in McCleskey. Four instrumentalist Justices dissented finding there was sufficient evidence to prove discriminatory intent in the application of the death penalty in Georgia.


70 481 U.S. 279, 286 (1987); id. at 345–47 (Blackmun, J., joined by Marshall & Stevens, JJ., and joined by Brennan, J., in all but Part IV-B, dissenting).
The Court has also considered the issue of discriminatory intent in the context of peremptory challenges used in jury selection. In *Batson v. Kentucky*, the Court noted that the “harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” For this reason, while prosecutors can exercise peremptory challenges "for any reason at all, as long as that reason is related to his [or her] view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids prosecutors from challenging potential jurors on account of their race or on the assumption that black jurors will be unable impartially to consider a case against a black defendant.

The Court stated in *Batson*: “In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a ‘pattern’ of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor’s questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. . . . Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . [T]he Equal Protection Clause forbids the States . . . to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. . . . The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

As the Court noted in 2005 in *Miller-El v. Dretke*, if a state court has found that the state’s race-neutral explanation was valid, and the defendant seeks habeas corpus relief in a federal court, the state court’s factual findings will be presumed accurate unless the defendant rebuts the presumption of correctness by clear and convincing evidence that they were not “objectively reasonable.” In *Miller-El*, a 6-3 Court majority concluded that such clear and convincing evidence existed. Justice Souter’s opinion supported this conclusion with four arguments: (1) there were similarities between black veniremen who were struck and white veniremen who were not; (2) different questions were asked of black and white veniremen regarding their views on the death penalty; (3) the prosecutor used a “jury shuffle” to postpone questioning of black veniremen; and (4) there was evidence of historical discrimination by the District Attorney’s office. In contrast, the dissent of Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, disputed that the majority’s analysis added up to the “clear and convincing” evidence necessary to support the majority’s conclusion.

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In cases after Batson, a majority of natural law and instrumentalist Justices have extended the Batson analysis to apply to use of peremptory challenges by private attorneys in civil litigation, to defense counsel in criminal trials, and to peremptory challenges based on gender discrimination. Batson does not apply to challenges based on language-speaking ability, either lack of proficiency in English, or proficiency in a second language, such as Spanish, that might undermine the juror’s ability to abide by the interpreter's version of the testimony. The Court has not yet decided whether Batson principles apply to religious discrimination – a classification, like race, that triggers strict scrutiny – or to cases involving sexual orientation.

Additional cases involving racially discriminatory intent have arisen in the context of state referenda. For example, California voters in 1966 approved Proposition 14, which repealed certain anti-discrimination laws. In Reitman v. Mulkey, a majority of the Supreme Court held that Proposition 14 overturning existing state anti-discrimination laws in housing was unconstitutional under the Equal Protection Clause, because Proposition 14 constituted state action to “authorize” or “encourage” private race discrimination, either expressly or impliedly. Similarly, in Hunter v. Erickson, a city charter provision that prevented the city council from implementing any ordinance dealing with discrimination in housing based on “race, color, religion, national origin, or ancestry,” without approval of a majority of city voters, was held unconstitutional as involving discrimination based on race. In both cases, the Court noted that the state action was making it more difficult for racial minorities to achieve their goals through the political process, giving rise to the term “political-process doctrine” to describe the cases. In 1982, the Court invalidated a law in Washington v. Seattle School District No. 1 that barred local school boards from requiring students to attend schools other than those nearest the students’ homes, unless ordered by a court of

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77 387 U.S. 369, 373-77 (1967); id. at 387 (Harlan, J., joined by Black, Clark & Stewart, JJ., dissenting).

78 393 U.S. 385, 389-93 (1969); id. at 393 (Harlan, J., joined by Stewart, J., concurring); id. at 396 (Black, J., dissenting).

competent jurisdiction for adjudicating constitutional issues. The Court explained that in the context of efforts to desegregate public schools this law, in a practical sense, allocated government power non-neutrally by race, placing special burdens on certain racial minorities to achieve legislation in their interest. Formalist, Holmesian, or natural law dissents in each of these cases said racial minorities were not uniquely burdened and the Constitution does not dictate at what level – constitutional provision, state statute, or local regulation – decisions must be taken.

In April, 2014, the Supreme Court held in Schuette v. Coalition to Defend Affirmative Action that a Michigan constitutional referendum, which repealed existing affirmative action programs in public education, employment, and contracting, was permissible and consistent with equal protection of the laws. The Court’s plurality distinguished the cases cited above by noting those cases involved actions designed “to encourage infliction of injury by reason of race,” while in Schuette there was no such indication, just a desire for equal treatment. A concurrence by Justices Scalia and Thomas would have been willing to overrule Hunter and Seattle School District No. 1, and to replace the “political-process doctrine” with straightforward analysis of discriminatory intent. A dissent would have held the Michigan action unconstitutional, since the constitutional referendum provision made it harder for minorities to overturn that decision than if the change were just statutory.

Even before Schuette, the Court had permitted some laws that increased the difficulty of obtaining reform. In 1971, in James v. Valtierra, the Court upheld a California Constitution provision that required a referendum for publicly supported low-rent housing projects, noting that persons in poverty are not a suspect class and California had a long history of using referenda to give citizens a voice on public policy. In 1982, the Court considered a California referendum that amended the California Constitution to forbid California courts from ordering busing unless required by the United States Constitution. The Court said in Crawford v. Board of Educ. of City of Los Angeles, the law contained no facial racial classification and no discriminatory purpose had been shown.


81 402 U.S. 137, 141-43 (1971); id. at 143 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting). Justice Douglas took no part in the consideration or decision of the case. Id. at 143.

82 458 U.S. 527, 543-45 (1982); id. at 545 (Blackmun, J., joined by Brennan, J., concurring); id. at 547-48 (Marshall, J., dissenting).
CHAPTER 21: REMEDIES IN RACIAL CLASSIFICATION CASES

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§ 21.1 Remedies in School Desegregation Cases

Brown v. Board of Education [Brown II]
349 U.S. 234 (1955)

Chief Justice WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date [in Brown v. Board of Education, excerpted at § 20.3], declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local
conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

Despite the optimistic tone in *Brown II*, the Court experienced great difficulty in getting states, particularly in the South, to comply with *Brown*.1 In 1964, the Court was aided by Congress, which

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in passing the Civil Rights Act of 1964 prohibited discrimination by schools receiving federal funds and authorized the Attorney General of the United States to intervene in desegregation lawsuits. The Elementary and Secondary Education Act of 1965 appropriated $2.5 billion for schools. In 1964, only 1.2% of African-American students in the South were attending schools with whites. By 1968, the integration rate had risen in the South to 32%, and by 1972-73, 91.3% of Southern schools were desegregated to some extent. Still, many school districts refused to implement Brown II in good faith. During the 1960s, the Court abandoned the “all deliberate speed” standard of Brown II, and said in Green v. County School Board of New Kent County, Virginia, excerpted below, that the “burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”

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Green v. County School Board of New Kent County, Virginia
391 U.S. 430 (1968)

Justice BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a “freedom-of-choice” plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility “to achieve a system of determining admission to the public schools on a non-racial basis . . . .” Brown v. Board of Education of Topeka, Kan., 349 U.S. 294, 300-301 (Brown II).

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the “school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school (New Kent), and one Negro combined elementary and high school (George W. Watkins). There are no attendance zones. Each school serves the entire county.” The record indicates that 21 school buses – 11 serving the Watkins school and 10 serving the New Kent school – travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va. Const., Art. IX, § 140 (1902); Va. Code § 22-221 (1950). These provisions were held to violate the Federal Constitution in Davis v. County School Board of Prince Edward County, decided with Brown v.

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Board of Education of Topeka, 347 U.S. 483, 487 [(1954)] (Brown I). The respondent School Board continued the segregated operation of the system after the Brown decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied. One statute, the Pupil Placement Act, Va. Code § 22-232.1 et seq. (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

It was such dual systems that 14 years ago Brown I held unconstitutional and a year later Brown II held must be abolished; school boards operating such school systems were required by Brown II “to effectuate a transition to a racially nondiscriminatory school system.” 349 U.S., at 301. It is of course true that for the time immediately after Brown II the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the “white” schools. See, e.g., Cooper v. Aaron, 358 U.S. 1 [(1958) (in an unusual opinion signed by all nine Justices, Governor and legislature of Arkansas ordered to comply with Brown, after the Governor called out the Arkansas National Guard to keep African-American students out of white schools, and President Eisenhower used federal troops to protect them)]. Under Brown II that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the “complexities arising from the transition to a system of public education freed of racial discrimination” that we provided for “all deliberate speed” in the implementation of the principles of Brown I. 349 U.S., at 299-301. This we recognized the task would necessarily involve solution of “varied local school problems.” Id., at 299. In referring to the “personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,” we also noted that “[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . . .” Id., at 300. Yet we emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner “is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.” Ibid.

It is against this background that 13 years after Brown II commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's “freedom-of-choice” plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may “freely” choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its “freedom-of-choice” plan may be faulted only by reading the Fourteenth Amendment as universally requiring “compulsory integration,” a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of Brown II. In the light of the command of that case, what is involved here is the question whether the Board has achieved the “racially nondiscriminatory school system” Brown II
held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former “white” school to Negro children and of the “Negro” school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. 

*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See Cooper v. Aaron, supra, 358 U.S. at 7. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.

In determining whether respondent School Board met that command by adopting its “freedom-of-choice” plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a “prompt and reasonable start.” This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for “the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.” Watson v. City of Memphis, supra, 373 U.S. at 529; see Rogers v. Paul, 382 U.S. 198 [(1965) (desegregation plan adopted in 1957 which provided for desegregating one grade a year, beginning in kindergarten, which would result in only new students to the school system after 1957 attending desegregated schools, while existing students in 1957 would never have their class desegregated, unconstitutional)]. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. “The time for mere “deliberate speed” has run out,” Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 234 [(1964) (action of County School Board in closing the public schools and meanwhile contributing to the support of private segregated white schools unconstitutional)], “the context in which we must interpret and apply this language (of *Brown II*) to plans for desegregation has been significantly altered.” Goss v. Board of Education of City of Knoxville, Tenn., 373 U.S. 683, 689 [(1963) (law allowing students placed in new schools according to desegregation plan to transfer back to former segregated school if they so chose unconstitutional)]. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system “at the earliest practicable date,” then the plan may be said to provide
effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See Raney v. Board of Education of Gould School District, 391 U.S. 443, at 449 [(1968) (“freedom-of-choice” plan inadequate where three years after adoption “not one white child has enrolled in the formerly all-Negro school and over 85% of Negro children remained in attendance at all-Negro school.”)].

We do not hold that “freedom of choice” can have no place in such a plan. We do not hold that a “freedom-of-choice” plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing “freedom of choice” is not an end in itself. As Judge Sobeloff has put it, “‘Freedom of choice’ is not a sacred talisman; it is only a means to a constitutionally required end – the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a ‘unitary, nonracial system.’” Bowman v. County School Board of Charles City County, 382 F.2d 326, 333 (C.A.4th Cir. 1967) (concurring opinion).

Although the general experience under “freedom of choice” to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, “freedom of choice” must be held unacceptable.

For many Southern school systems, it was relatively easy to find a constitutional violation under Brown, thus triggering the need for a remedy under Brown II, because those states had explicit policies calling for segregation. When challenges were made to school systems in Northern states, where no such policies ever officially existed, but where there were many one-race schools in practice, it became critical to determine whether the segregation was the result of discriminatory intent. Several principles were used to deal with this problem.

First, under standard discriminatory intent analysis, addressed at § 20.4, courts may consider the extent of the separation, the historical development of decisions, the specific sequence of events leading up to challenged decisions, departures from normal procedural practices, and legislative and administrative history, including reports and testimony by officials. The Court also held that if there is proof of intentional segregation in a meaningful portion of the school district, courts should presume that other segregated schools in the district also resulted from intent, and that if more than one racial group is the victim of discrimination, the groups may be aggregated in considering the
existence of a violation and remedies.\textsuperscript{3} Also, in the school desegregation context, the Court held that if the plaintiff proved purposeful discrimination in the past, not remedied by board action, and there presently is system-wide racial disproportion in schools, there is a \textit{prima facie} case that the current segregation was caused, at least in part, by the prior acts.\textsuperscript{4} Such decisions made possible desegregation lawsuits in many Northern cities, as well as those in the South.

Three years after \textit{Green}, in 1971, the Court slightly expanded the remedial options in \textit{Swann v. Charlotte-Mecklenburg Board of Education}.\textsuperscript{5} In \textit{Swann}, the Court provided relatively specific guidelines that have been used by courts ever since. Chief Justice Burger said, “The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.” To achieve this object, the Chief Justice explained that all areas of discrimination must go: students, faculty, supporting personnel, transportation, extracurricular activities, and school construction and closing. The district judge or school authorities must make every effort to achieve the greatest degree of actual desegregation. Mathematical ratios could be used as a starting point in assigning students, and students could be ordered transported. Six years later, in 1977, the Court noted in \textit{Milliken v. Bradley (Milliken II)}\textsuperscript{6} that a remedial decree can include ancillary matters, such as training programs for teachers, guidance and counseling programs, and revised testing procedures. Also ancillary are orders for defendants to pay costs and the attorneys’ fees of prevailing parties. Usually the school board is ordered to pay court costs and reasonable attorneys’ fees. If the state was involved in the discrimination, it may also be ordered to share in paying for the remedy.

During the 1970s, district courts began to discover that population shifts in many cities, primarily "white flight" to the suburbs, were making it difficult to end racial separation in city school systems. Orders were entered requiring suburban schools to accept students from the inner city, or requiring students from the suburbs to attend school in the inner city. However, the Court largely ended this practice with its decision in 1974 in \textit{Milliken v. Bradley (Milliken I)}\textsuperscript{7}. There, over objections by liberal instrumentalist Justices Douglas, Brennan, and Marshall, and liberal Holmesian Justice White, the majority, per Chief Justice Burger, held that an interdistrict remedy is proper only when there has been an interdistrict violation, \textit{e.g.}, district lines were drawn on the basis of race, or a constitutional violation in one district is shown to have significant segregative effects in another district. Suburban districts that had always let all students attend neighborhood schools had never engaged in unconstitutional racial discrimination, even if an overwhelming proportion of their students were white, because an overwhelming number of their residents were white. As in \textit{Village


\textsuperscript{5} 402 U.S. 1, 15-31 (1971).


\textsuperscript{7} 418 U.S. 777, 744-46 (1974); \textit{id.} at 762 (White, J., joined by Douglas, Brennan & Marshall, JJ., dissenting).
of Arlington Heights, excerpted at § 20.4, the single-family zoning policy, which reduced the availability of moderate-income and low-income housing, but were held to be constitutional because the challengers could not convince a majority of the Court they were passed with a discriminatory intent, thus contributed to making Arlington Heights, and other similar suburban cities, effective “white flight” destinations.

Another restrictive rule was created in Dayton Board of Education v. Brinkman (Dayton I).\(^8\) In 1977, the Court held in Dayton I that if only a few isolated discriminatory practices exist, the district court should limit the remedy to the incremental segregative effect of the discrimination. This result was “clarified” by Dayton Board of Education v. Brinkman (Dayton II)\(^9\) in 1979, where liberal Holmesian Justice White, joined by liberal instrumentalist Justices Brennan, Marshall, Blackmun, and Stevens, held that the incremental rule applies only if there are a few isolated discriminatory practices. A court may order a system-wide remedy if it finds current, system-wide impact.

In 1990, the Court held in Spallone v. United States\(^10\) that if the court enters an order calling for legislative action that is not taken, the court can impose contempt sanctions against the governmental unit, but not against individual legislators, unless sanctions against the unit fail to produce compliance within a reasonable time. Further, if compliance with a desegregation order requires funding that the local agency cannot obtain because of resistance from the public or state laws, a 5-4 Court held in Missouri v. Jenkins (Jenkins II)\(^11\) that the court may direct the local agency to levy taxes and may enjoin state laws that limit such levies. On the other hand, in 1995, the Court reaffirmed in Missouri v. Jenkins (Jenkins III)\(^12\) the Milliken I principle in holding that a district court seeking to remedy an intradistrict violation that has not directly caused significant interdistrict effects exceeds its remedial authority if it orders a remedy with an interdistrict purpose. In this case, the District Court for the Western District of Missouri, attempting to eliminate vestiges of segregation from the public schools in Kansas City, Missouri, required the state to fund magnet programs in most of the city's schools in order to induce white children from the suburbs to enroll in city schools. The Supreme Court held that since there was no evidence of an interdistrict violation, the District Court's order was beyond the scope of its authority.

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\(^9\) 443 U.S. 526, 540-42 (1979); id. at 542 (Rehnquist, C.J., joined by Powell, J., dissenting); id. at 526 (Stewart, J., joined by Burger, J., dissenting) (opinion at Columbus Board of Education v. Penick, 443 U.S. 449, 469 (1979)).

\(^10\) 493 U.S. 265, 276-77 (1990); id. at 281 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting) (sanctions against local officials appropriate on these facts).

\(^11\) 495 U.S. 33, 55-58 (1990); id. at 58-59 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ., dissented from this part of the Court’s ruling).

\(^12\) 515 U.S. 70, 94-97 (1995); id. at 138 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).
With respect to termination of desegregation litigation, the Court has labored to formulate appropriate principles. In 1991, in *Board of Education of Oklahoma City Public Schools v. Dowell*, the Court held that a desegregation decree can be undone only by a "rather precise statement." Chief Justice Rehnquist's opinion said a decree is appropriately dissolved if the purposes of the litigation have been fully achieved. That occurs when the system has achieved “unitary” status, that is, is being operated in compliance with the Equal Protection Clause, and it is unlikely the board will return to its former ways. In finding compliance, the court should ask whether the board has complied in good faith and whether all vestiges of past discrimination had been eliminated to the extent practicable, but a court should not make unsupported findings that current residential segregation is a vestige of former school segregation. In dissent, Justices Marshall, Blackmun, and Stevens would not allow dissolution if feasible steps could be taken to avoid one-race schools.

A creative half-way solution was found by the Court in *Freeman v. Pitts*. In 1992, the Court held in *Freeman* that a district court may partially withdraw from supervision over a school system that has demonstrated a good faith commitment to a constitutional course of action, if nothing requires intrusive measures to achieve racial balance in student assignments in the late phases of carrying out a desegregation decree because the imbalance is not attributable to either the prior system or to a later violation by the school district. The Court also held that a district court has authority to relinquish supervision and control over a school district in incremental stages before full compliance has been achieved in every area of operations. Thus, a district court could withdraw from ordering relief with regard to school assignments, transportation, physical facilities, and extracurricular activities, but continue to oversee teacher and principal assignments, resource allocation, and quality of education. Further, the Court noted in *Missouri v. Jenkins (Jenkins III)*, that asking whether the scores of a system's students are at or below national norms at many grade levels is not an appropriate test to decide whether a previously segregated district has achieved partial unitary status.

At the end of the day, the cases involving school desegregation point out the difficulty courts may have in producing significant social reform, even with backing from Congress and the President, particularly if there is significant social opposition. On the other hand, *Brown v. Board of Education* and its progeny put societal desegregation on the national agenda, and was a catalyst for a whole host of civil rights laws. The *Brown* Court’s rejection of permitting customs and traditions

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13 498 U.S. 237, 246 (1991); *id.* at 251-52 (Marshall, J., joined by Blackmun & Stevens, JJ., dissenting).


regarding segregation to determine the outcome of the Equal Protection analysis also foreshadowed the view, discussed at § 19.1 nn.31-36, that a bare desire to harm a politically unpopular group is an illegitimate interest under modern Equal Protection Clause analysis.

In retrospect, it appears that the Court won its struggle to have local school boards engage in good faith compliance with the underlying constitutional principles. But residential decisions by some citizens to move from urban school districts to the suburbs, and decisions by other citizens who have chosen to remain in urban districts but place their children in private schools, have undone to a substantial extent what the Court was trying to do. Many systems remain quite segregated along racial lines, although large city school districts, in good faith today, attempt to keep white students in the predominantly minority city public school systems, though various use of magnet programs in specialized areas (e.g., language, science, arts) or publically-supported charter schools.\(^18\)

In this sequence of cases, the Court involved itself and the lower federal courts more deeply in the administration of local affairs than it ever has done in any other area of law. In some other contexts, such as management of state prisons or state mental health facilities, federal courts have intruded into the management of state and local governmental operations as part of remedying some constitutional violation. But the number and extent of such cases, while large, is less than in the school desegregation context.\(^19\) In this context, usual concerns with federalism were trumped by a commitment to eliminate from public education all traces of intentional race discrimination. This commitment was a deep one in part because of the concerns expressed in Brown about the effect on minority students when treated as inferior by the community, and by the view that unless children are educated together it will be harder for them to live together in an increasingly diverse society.

\section*{§ 21.2 Remedies in Job and Employment Cases}

The Court has always held that remedying prior discrimination in employment and hiring practices is a compelling government interest. Following the Civil Rights Era of the 1960s, the federal government, in the Civil Rights Act of 1964, and most states, under various employment anti-discrimination acts, have passed statutes banning discrimination based on race, ethnicity, national

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\(^18\) See generally Lia Epperson, \textit{Bringing the Market to Students: School Choice and Vocational Education in the Twenty-First Century}, 87 Notre Dame L. Rev. 1861 (2012) (optimistic about such choice programs); Taunya Lovell Banks, \textit{The Unfinished Journey—Education, Equality, and Martin Luther King, Jr. Revisited}, 58 Villanova L. Rev. 471 (2013) (noting that almost 40% of African-American and Hispanic students attend schools where more than 90% of students are non-white).

\end{quote}
origin, religion, and other such categories. Those statutory bans obviate any need for review on unconstitutionality under the Equal Protection Clause.

A constitutional issue is created, however, where a remedy for prior race discrimination involves racial discrimination in the form of “affirmative action” on behalf of the group previously discriminated against. Such “affirmative action” began in the 1970s. The Supreme Court’s first case of a state’s voluntary affirmative action program was Regents of the University of California v. Bakke\(^\text{21}\) in 1978. In Bakke, the University of California-Davis medical school had set aside 16 of 100 places for minorities in its first-year class. As discussed at § 21.3 n.55, Justices Brennan, White, Marshall, and Blackmun tested the program by intermediate scrutiny, concluding that it was constitutional because the school’s purpose of remedying the effects of past societal discrimination was legitimate and substantial, and the handicap of past discrimination was impeding the access of minorities to the medical school. Chief Justice Burger, along with Justices Stewart, Rehnquist, and Stevens, said that the affirmative action program was in conflict with § 601 of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d. That Act bars excluding anyone “on the ground of race, color, or national origin” from receiving the benefits of any program receiving federal financial assistance, as did the University. Given this 4-4 split, Justice Powell held the key vote in the case. He joined with the Burger group in finding the Davis program illegal. However, he joined with the Brennan group in holding that § 601 did not bar use of race except where it would be unconstitutional under the Equal Protection Clause. Justice Powell reasoned that there should be strict scrutiny of all racial classifications because the 14th Amendment is a guarantee of personal rights to individuals and not to groups. On the merits, he concluded that a rigid 16% set-aside was unconstitutional, but that use of race as a factor in admissions likely would be the least burdensome effective alternative, as discussed at § 21.3 nn.50-54. Because of the vote pattern in Bakke, that case did not definitely settle whether strict scrutiny should be applied to race-based affirmative action programs, as argued by Justice Powell, or intermediate review, as supported by the Brennan Four.

The issue of a standard of review for federal affirmative action programs was addressed, but left clouded, two years later in Fullilove v. Klutzick.\(^\text{22}\) Fullilove involved a federal program that created a 10% minority-owned firm set-aside in construction grants to the states. The Supreme Court upheld

\(^{20}\) See Bradley A. Areheart, The Anticlassification Turn in Employment Discrimination Law, 63 Ala. L. Rev. 955 (2012) (discussing not only the Title VII of the Civil Rights Act of 1964, but other anti-discrimination statutes like the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990); Nancy Levit, Changing Workforce Demographics and the Future of the Protected Class Approach, 16 Lewis & Clark L. Rev. 463, 469-74 (2012) (discussing which groups are covered and not covered by federal and state statutory enactments).

\(^{21}\) 438 U.S. 265, 269-72, 289-91 (1978) (Powell, J., opinion, announcing the judgment of the Court); id. at 359-62, 373-79 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); id. at 412-18 (Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ., concurring in the judgment in part and dissenting in part).

\(^{22}\) 448 U.S. 448 (1980).
the program by a 6-3 vote. Instrumentalist Justices Brennan, Marshall, and Blackmun had no problem in finding that the program satisfied intermediate scrutiny, as the program was substantially related to achievement of important government objectives – namely, remedying the present effects of past discrimination in a way that does not stigmatize, since a contract could be awarded to a minority enterprise only if it was qualified to do the work.23 The difficulty in characterizing what the Court had done was created by Chief Justice Burger’s opinion, an opinion in which Justices White and Powell joined. The Chief Justice said that his opinion did not adopt either the intermediate or strict scrutiny formulas discussed in *Bakke*, but that Congress’ spending provision would survive judicial review under either test. This law was sufficiently tailored in his view because its provisions for waivers and grievances gave reasonable assurance that application of the program would be limited to accomplishing the remedial objectives contemplated by Congress.24 In a concurring opinion, Justice Powell said that he joined the Chief Justice’s opinion because it was substantially in accord with his own views, as expressed in *Bakke*. Here, he said, Congress was an appropriate authority to act in response to identified discrimination that contributed significantly to the small percent of federal contracting funds (less than 1%) that minority business enterprises had received. This was the least burdensome effective alternative because Congress knew that other remedies had failed and there was a waiver provision in which the problems of particular geographic areas where minority group members constitute a small percentage of the population could be considered. Further, Justice Powell noted that the choice of a 10% set-aside was reasonable because it “falls roughly halfway between the present percentage of minority contractors [4%] and the percentage of minority group members in the Nation [17%].” Finally, the set-aside would have no effect on the ability of the remaining 96% of non-minority contractors to compete for the remaining 99.75% of construction funds for all construction projects nationwide, both public and private, that were not affected by the 10% set-aside for federal construction projects.25

Justice Stewart, dissenting with Justice Rehnquist, said the Constitution is “color blind,” and any official action that treats a person differently on account of race or ethnic origin is inherently suspect. Applying strict scrutiny, Stewart could find no compelling governmental interest, since in his view there was not sufficient evidence that Congress had engaged in the past in racial discrimination in its disbursement of federal funds.26 Justice Stevens, also dissenting, said that the federal government has a duty to govern impartially. That duty was unsatisfied where Congress had failed to explain what relevant characteristic justifies the special treatment given to all citizens who are African-American, Hispanic, Orientals, Indians, Eskimos, or Aleuts.27

23 *Id.* at 519-20 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring).

24 *Id.* at 477-78, 490-92 (Burger, C.J., joined by White & Powell, JJ., announcing the judgment of the Court).

25 *Id.* at 510-15 (Powell, J., concurring).

26 *Id.* at 522-23 (Stewart, J., joined by Rehnquist, J., dissenting).

27 *Id.* at 535-36 (Stevens, J., dissenting).
In 1986, the Court began to gravitate toward its present insistence on strict scrutiny for all race-based affirmative action programs. A start was made in *Wygant v. Jackson Board of Education*.\(^{28}\) In that 5-4 case, a number of white teachers had been laid off pursuant to an agreement between the board and the teachers’ union that when layoffs were required teachers with the most seniority would be retained, except that such layoffs could not reduce the percentage of minority personnel employed at the time of the layoff. Justice Powell’s plurality opinion, joined in full by Chief Justice Burger and Justice Rehnquist, and in substantial part by Justice O’Connor, applied strict scrutiny and held that the board’s goal in adopting layoff protection for minority teachers of providing minority role models for minority students could not be regarded as constitutional since: (1) while providing minority role models might be sufficiently related to alleviating the effects of general societal discrimination against minorities, that interest, as in Justice Powell’s opinion in *Bakke*, was not a compelling government interest, addressed at § 21.3 n.52; (2) providing minority role models was not directly related to responding to any compelling government interest in remediating any racial discrimination in employment which had previously occurred; and (3) the loss of an existing job, though limiting seniority protection in order to keep recently hired non-white employees, imposed too severe a burden on white employees, since less burdensome effective means to remedy any prior employment discrimination were available, such as the adoption of hiring goals. Justice O’Connor’s separate concurrence emphasized that the finding of past discrimination needed to justify an affirmative action program need not be made by a court or other authorized agency. Justice White, concurring in the judgment, noted there had been no showing that the black teachers for whom white teachers had been discharged were the victim of any racial discrimination.

Four Justices were in dissent. Justice Marshall, dissenting with Justices Brennan and Blackmun, continued to insist on intermediate scrutiny. He said that a public employer should be permitted to preserve the benefits of a legitimate and constitutional affirmative action program even while reducing its workforce. Justice Stevens, in a separate dissent, said that it was reasonable for the board to conclude that an integrated faculty would be able to provide benefits for students that could not be provided by an all-white, or nearly all-white, faculty.\(^{29}\)

The Court noted in 1986 in *Local No. 93, International Association of Firefighters v. Cleveland*\(^{30}\) that the Civil Rights Act of 1964 encourages voluntary resolution of affirmative action problems. A consent decree, which is a form of contract between the parties, may call for an affirmative action program without a showing that the persons benefitted have been discriminated against. In this case, a union that had engaged in race discrimination and had also violated an order requiring it to achieve

\(^{28}\) 476 U.S. 267, 269, 273-84 (1986) (plurality opinion of Justice Powell, joined by Burger, C.J., and Rehnquist, J., and in all but Part IV by O’Connor, J.); *id.* at 284 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 294 (White, J., concurring in the judgment).

\(^{29}\) *Id.* at 295 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting); *id.* at 313 (Stevens, J., dissenting).

\(^{30}\) 478 U.S. 501, 524-30 (1986); *id.* at 531-32 (White, J., dissenting); *id.* at 535-36 (Rehnquist, J., joined by Burger, C.J., dissenting).
a goal of 29% non-white membership by 1981, was ordered to support a fund for increasing the pool of qualified non-white applicants and was ordered to achieve a 29% goal of non-white members by 1987. The Court upheld the order, noting that the relief passed even the most rigorous scrutiny test.

A similar result was reached in 1987 in *United States v. Paradise*. In *Paradise*, a 5-4 Court upheld a temporary court order for “a 50% promotional quota in the upper ranks [in the Alabama state trooper force], but only if there were qualified black candidates, if the rank were less than 25% black, and if the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank.” The Court upheld the order finding there was a compelling interest in remedying past and present discrimination by the state police force. The plan was directly related to remedying prior discrimination, since the quota would directly advance minority hiring. The plan was an acceptable alternative, since less vigorous kinds of affirmative action, requiring race to be used as a factor in the employment decision, had been in use for the previous 10 years, with no increase in successful minority hiring. For four Justices, Justice Brennan observed that the Court had not in all situations required court-ordered remedial plans to be the least restrictive means of implementation. Justice Stevens concurred only in the judgment. He said that where law violations had not been proved there should be a strong presumption against race-conscious decisions. Here, the decree should be tested by whether it exceeds the bounds of reasonableness. Chief Justice Rehnquist dissented, along with Justices White, O'Connor, and Scalia. To survive strict scrutiny, an order must fit with greater precision than any alternative remedy. Here, the court could have appointed a trustee to develop promotion procedures or could have found the Department in contempt, but there was no hint that the district court considered alternative remedies.

A more definitive holding that full vigorous strict scrutiny is necessary in a race-based affirmative action case was reached in 1989 in *City of Richmond v. J.A. Croson Co.*, excerpted below. Under the strict scrutiny approach of *Croson*, the prior racial discrimination must be by that government entity, against that minority group, in that particular industry, in order to have a compelling interest to regulate. Thus, the City of Richmond can only adopt an affirmative action program for city contracting to remedy prior racial discrimination by the City of Richmond in the construction industry; the state of Virginia could only remedy discrimination by Virginia; the federal government can only remedy federal discrimination. A city cannot remedy general societal discrimination, even in the construction industry, since there is only a compelling interests to remedy their own prior discrimination, against that minority group, in that local industry. The remedy then must be directly related to remedying that prior racial discrimination, and must employ the least restrictive (i.e., least burdensome) alternative in order for the race-based affirmative action program to be constitutional.

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32 Id. at 184-85.

33 Id. at 194-95 & n.4 (Stevens, J., concurring in the judgment).

34 Id. at 196-201 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., dissenting); id at 196 (White, J., dissenting) (stating he agreed with much of what Justice O'Connor said in her dissent).

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City of Richmond v. J.A. Croson Co.
488 U.S. 469 (1989)

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and Justice WHITE join, and an opinion with respect to Parts III-A and V, in which THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, e.g. South Florida Chapter, Associated General Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846 (CA11), cert. denied, 469 U.S. 871 (1984); Ohio Contractors Assn. v. Keip, 713 F.2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, e.g., Michigan Road Builders Assn., Inc. v. Milliken, 834 F.2d 583 (CA6 1987); Associated General Contractors of Cal. v. City and Cty. of San Francisco, 813 F.2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83-69-59, codified in Richmond, Va., City Code, § 12-156(a) (1985). The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors. Ibid.

The Plan defined an MBE as “[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.” § 12–23, p. 941. “Minority group members” were defined as “[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.” Ibid. There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was “remedial” in nature, and enacted “for the purpose of promoting wider participation by minority business enterprises in the construction of public projects.” § 12–158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. Ibid. [FN 1:The expiration of the
ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages.]

The Plan was adopted by the Richmond City Council after a public hearing. App. 9-50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement: “There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.” Id., at 41.

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See id., at 42 (statement of Councilperson Wake) (“[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available”).

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBE's had little probative value in establishing discrimination in the construction industry. Id., at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there were enough MBE's in the Richmond area to satisfy the 30% set-aside requirement. Id., at 32 (statement of Mr. Beck); id., at 33 (statement of Mr. Singer); id., at 35–36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. Ibid. Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBE's eligible for the 30% set-aside. Id., at 44. Some of the representatives of the local contractor's organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking out minority members. Id., at 38 (statement of Mr. Shuman) (“The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us”); see also id., at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his
concern about the legality of the Plan, and asked that a vote be delayed pending consultation with
outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two,
with Councilperson Gillespie abstaining. Id., at 49.

III

A

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for
remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of
racial hostility. See University of California Regents v. Bakke, 438 U.S., at 298 (opinion of Powell,
J.) (“[P]referential programs may only reinforce common stereotypes holding that certain groups are
unable to achieve success without special protection based on a factor having no relation to
individual worth”). We thus reaffirm the view expressed by the plurality in Wygant that the standard
of review under the Equal Protection Clause is not dependent on the race of those burdened or
benefitted by a particular classification. Wygant, 476 U.S., at 279-280; id., at 285–286 (O'Connor,
J., concurring in part and concurring in judgment).

Even were we to accept a reading of the guarantee of equal protection under which the level of
scrutiny varies according to the ability of different groups to defend their interests in the
representative process, heightened scrutiny would still be appropriate in the circumstances of this
case. One of the central arguments for applying a less exacting standard to “benign” racial
classifications is that such measures essentially involve a choice made by dominant racial groups
to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause
is to protect “discrete and insular minorities” from majoritarian prejudice or indifference, see United
States v. Carolene Products Co., 304 U.S. 144, 153, n.4 (1938), some maintain that these concerns
are not implicated when the “white majority” places burdens upon itself. See J. Ely, Democracy and
Distrust 170 (1980).

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five
of the nine seats on the city council are held by blacks. The concern that a political majority will
more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete
facts would seem to militate for, not against, the application of heightened judicial scrutiny in this
case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739,
n. 58 (1974) (“Of course it works both ways: a law that favors Blacks over Whites would be suspect
if it were enacted by a predominantly Black legislature”).

B

While there is no doubt that the sorry history of both private and public discrimination in this
country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing
alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.
Like the claim that discrimination in primary and secondary schooling justifies a rigid racial
preference in medical school admissions, an amorphous claim that there has been past discrimination
in a particular industry cannot justify the use of an unyielding racial quota.
It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as “identified discrimination” would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate “facts” in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp. App. 163-167.

None of these “findings,” singly or together, provide the city of Richmond with a “strong basis in evidence for its conclusion that remedial action was necessary.” Wygant, 476 U.S., at 277 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry. Id., at 274-275; see also id., at 293 (O'Connor, J., concurring).

The District Court accorded great weight to the fact that the city council designated the Plan as “remedial.” But the mere recitation of a “benign” or legitimate purpose for a racial classification is entitled to little or no weight. See Weinberger v. Wiesenfeld, 420 U.S., at 648, n.16 (“This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation”). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. See Teamsters v. United States, 431 U.S. 324, 337-338 (1977) (statistical comparison between minority truck-drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See Hazelwood, supra, 433 U.S., at 308; Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 651-652 (1987) (O'Connor, J., concurring in judgment).

In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Cf. Ohio Contractors Assn. v. Keip, 713 F.2d, at 171 (relying on percentage of minority businesses in the State compared to
percentage of state purchasing contracts awarded to minority firms in upholding set-aside). Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See Associated General Contractors of Cal. v. City and Cty. of San Francisco, 813 F.2d, at 933 ("There is no finding – and we decline to assume – that male caucasian contractors will award contracts only to other male caucasians"). Indeed, there is evidence in this record that overall minority participation in city contracts in Richmond is 7 to 8%, and that minority contractor participation in Community Block Development Grant construction projects is 17 to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications. . . ." Bakke, 438 U.S., at 296-297 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp. App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See Wygant, 476 U.S., at 284, n.13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").
IV

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See United States v. Paradise, 480 U.S. 149, 171 (1987) (“In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies”). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See Fullilove, 448 U.S., at 463-467; see also id., at 511 (Powell, J., concurring) (“[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry”).

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the “completely unrealistic” assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) (“[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination”).

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailormed remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion) (“[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality”). Under Richmond's scheme, a successful black, Hispanic, or
Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See Bazemore v. Friday, 478 U.S., at 398; Teamsters v. United States, 431 U.S., at 337-339. [T]he city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, e.g., New York State Club Assn. v. New York City, 487 U.S. 1, 10-11, 13-14 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See Teamsters, supra, 431 U.S., at 338.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

Justice STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions – including those that govern the
relationships among different racial and ethnic groups – primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. I do, however, agree with the Court's explanation of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III-B, and IV.

**Justice SCALIA, concurring in the judgment.**

I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is “remedial” or “benign.” I do not agree, however, with Justice O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) “to ameliorate the effects of past discrimination.” The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-276 (1986) (plurality opinion) (discrimination in teacher assignments to provide “role models” for minority students); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social “pressures and stresses”); *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency – fatal to a Nation such as ours – to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that “[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” A. Bickel, *The Morality of Consent* 133 (1975). . . . [O]nly a social emergency rising to the level of imminent danger to life and limb – for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle . . . “[o]ur Constitution is color-blind . . .” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

**Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, dissenting.**

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from – and in fact was patterned upon – the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's position is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council has supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in Fullilove, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

As for Richmond's 30% target, the majority states that this figure “cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.” The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring has far less impact than the majority suggests. But more important, the majority ignores the fact that Richmond's 30% figure was patterned directly on the Fullilove precedent. Congress' 10% figure fell roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation.” Fullilove, supra, 448 U.S., at 513-514 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its choice of a set-aside figure, the majority honors Fullilove only in the breach.

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. Ante, at 716-717; ante, at 735 (Scalia, J., concurring in judgment). This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, e.g., Wygant v. Jackson Bd. of Education, 476 U.S., at 301-302 (Marshall, J., dissenting); Fullilove, supra, 448 U.S., at 517-519 (Marshall, J., concurring in judgment); University of California Regents v. Bakke, 438 U.S., at 355-362 (joint opinion of Brennan, White, Marshall and Blackmun, JJ.).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however,
do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, “the circumstances of this case” require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a “dominant racial group” in the city. Ibid. In support of this characterization of dominance, the majority observes that “blacks constitute approximately 50% of the population of the city of Richmond” and that “[f]ive of the nine seats on the City Council are held by blacks.”

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group “suspect” and thus entitled to strict scrutiny review. Rather, we have identified other “traditional indicia of suspectness”: whether a group has been “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any “history of purposeful unequal treatment.” Ibid. Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provides an enormous political check against the “simple racial politics” at the municipal level which the majority fears.

On the issue of affirmative action in the context of government economic programs, see also Rothe Development, Inc. v. Department of Defense, 836 F.3d 57 (D.C. Cir. 2016) (Small Business Administration program for “small business concerns owned and controlled by socially and economically disadvantaged individuals” not an example of facial racial discrimination, nor passed with racially discriminatory intent, despite definition of such individuals as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities” and statement in statute that “such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities”; focus of statute is on any individual who has experienced discrimination, not on individual’s race or ethnicity, and thus program is constitutional under minimum rationality review, since strict scrutiny, applicable to race or ethnic discrimination, does not apply).
Early in the 1990s, there was one instrumentalist victory in support of intermediate scrutiny for race-based affirmative action, a victory destined to be short-lived. In *Metro Broadcasting Inc. v. FCC*, five votes were secured to uphold an FCC program that awarded an enhancement for minority ownership in comparative proceedings for new broadcast licenses and that permitted a limited number of existing radio and television broadcast stations to be transferred only to minority-controlled firms. Justice Brennan’s opinion said that the program had been mandated by Congress and that a majority of the Court in *Fullilove* did not apply strict scrutiny to such race-based classifications. He said that even if it was not “remedial,” the program served the important governmental objective of enhancing broadcast diversity and was substantially related to that objective because it was based on an analysis by Congress that there is a nexus between minority ownership and programming diversity. Justice Stevens concurred because to him the case fell within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment. The reason was that the public interest is served by broadcast diversity, as it is served by diversity in the police force, in a school faculty, or in the student body of a professional school. Justice White joined the four instrumentalists in this case, probably based on Justice White’s strong policy of deference to Congress, that policy typical for liberal Holmesian judges, as opposed to the conservative Holmesian predisposition to defer to states, as discussed at § 8.1.1(E) n.30. Because *Metro Broadcasting* involved a congressionally-approved affirmative action program, rather than a state or local affirmative action program, as in *Richmond v. J.A. Croson Co.*, Justice White was willing to apply only intermediate scrutiny. Justice O’Connor dissented, with Chief Justice Rehnquist and Justices Scalia and Kennedy. Justice O’Connor insisted that strict scrutiny should apply to federal as well as to state affirmative action programs, and the FCC’s program failed strict review because diversity of broadcast viewpoints is not a compelling interest as it is too amorphous, insubstantial, and unrelated to any legitimate basis for employing racial classifications. Further, the chosen means could not be deemed narrowly tailored because they rested on stereotyping and only indirectly furthered the end of broadcast diversity.

Six years later, after four of the five Justices in the majority in *Metro Broadcasting* had left the Court, it was overruled. In *Adarand Constructors, Inc. v. Pena*, a federal highway construction program included a race-based rebuttable presumption that certain minorities were socially and economically disadvantaged, and it provided extra compensation for general contractors who employed subcontractors certified as small businesses controlled by disadvantaged individuals. Justice O’Connor, speaking for a majority of the 4 dissenters in *Metro Broadcasting*, joined now by Justice Thomas, stated the controlling legal principle as follows, “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly
tailored measures that further compelling governmental interests.\textsuperscript{39} Justice O’Connor added that to the extent \textit{Metro Broadcasting} was inconsistent with this principle, it was overruled. She explained that \textit{Metro Broadcasting} had departed from prior cases in failing to acknowledge that 14th Amendment rights are individual rights rather than group rights, and in departing from skepticism of all racial classifications and consistency of treatment irrespective of the race of the burdened or benefitted group.\textsuperscript{40} Justice Scalia, concurring, took an even more rigid view than did Justice O’Connor. He said: “In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination.”\textsuperscript{41} Dissenting were Justices Stevens, Souter, Ginsburg, and Breyer. Justice Stevens said that there is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. No sensible conception of the government’s constitutional obligation to “govern impartially” should ignore this distinction. This distinction usually is obvious, said Justice Stevens, as it is here. Further, greater deference should be given to Congress’ institutional competence and constitutional authority when it enacts a program designed to foster equality.\textsuperscript{42} Justice Ginsburg, with whom Justice Breyer joined, said in dissent that given the Nation’s history of race discrimination and its practical consequences, Congress can conclude that a carefully designed affirmative action program may help to realize the equal protection of laws promised by the 14th Amendment since 1868. Seeking to allow some affirmative action programs to survive, she underscored that Justice O’Connor’s opinion said that strict scrutiny is not always fatal in fact.\textsuperscript{43} Justice Souter, dissenting with Justices Ginsburg and Breyer, echoed the above theme of Justice Ginsburg, and explicitly rejected Justice Scalia’s limit on affirmative action.\textsuperscript{44} Applying strict scrutiny, narrowly drawn affirmative action programs in federal and state government contracting have continued to be upheld as constitutional.\textsuperscript{45} City affirmative action programs remain in wide-spread use as well. After \textit{Croson}, most cities wishing to have a race-based affirmative action program for city contracting did more detailed studies putting together the

\textsuperscript{39} \textit{Id.} at 227.

\textsuperscript{40} 515 U.S. at 227-31.

\textsuperscript{41} \textit{Id.} at 239 (Scalia, J., concurring in part and concurring in the judgment).

\textsuperscript{42} \textit{Id.} at 242-64 (Stevens, J, joined by Ginsburg, J., dissenting).

\textsuperscript{43} \textit{Id.} at 271-76 (Ginsburg, J., joined by Breyer, J, dissenting).

\textsuperscript{44} \textit{Id.} at 264-71 (Souter, J., joined by Ginsburg & Breyer, JJ, dissenting).

\textsuperscript{45} \textit{See, e.g., Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (Adarand II ), cert. granted then dismissed as improvidently granted, 534 U.S. 103 (2001).}
evidence of prior racial discrimination against minority groups. Not surprisingly, most larger cities, typically run by Democratic majority city councils and Democratic mayors, do want to have such a program. If ever tested in court, some of these programs might still be somewhat overbroad, as many continue to provide Minority Business Enterprise (MBE) protection for the range of minority groups protected in *Croson*—African-American, Hispanic, Asian-Americans, Native Americans, Eskimos or Aleuts—even in cities with little evidence of discrimination against some of these groups. There is not much continuing litigation in this area, however, as the standard affirmative action program provides only for a 10% set-aside, and this often includes both MBEs and women-owned construction firms. In most cities today, as well as for states or the federal government, 10% of construction contracts are going to be awarded to such businesses anyway, and white construction firms do not want to upset the local governments by challenging such programs, and perhaps suffer good-will ties with local government contracting authorities, merely for ideological reasons.

In terms of racial considerations in hiring, in 2009 a 5-4 Court held in *Ricci v. Destefano* that a city violated the disparate treatment provisions of Title VII, which do not require a finding of discriminatory purpose, only discriminatory impact, when it refused to certify test results for promotions in its fire department because only a few minorities passed the test. The city feared that if the results were certified the city would be liable for violating the disparate impact provisions of Title VII because fewer minorities would be hired. Justice Kennedy wrote that before an employer in this situation could engage in the intentional race discrimination involved in refusing to certify test results, it must have a “strong basis in evidence,” lacking here, to believe it will be subjected to disparate-impact liability if it fails to take the race-conscious discriminatory action of refusing to certify the results. Although the Court did not decide anything under the Equal Protection Clause, Justice Kennedy said some Equal Protection precedents, like *Croson*, supported the use of a “strong basis in evidence” rule. Justice Kennedy concluded that there was no support for a finding that the city had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII. Justice Scalia, concurring, suggested that Title VII itself might be in violation of the Equal Protection Clause if it required that an employer must take race-based actions when a disparate-impact violation would otherwise ensue, and does not also provide an affirmative defense for good faith hiring standards that are reasonable. A four-Justice dissent, authored by Justice Ginsburg, emphasized that the city was trying to overcome a past system in which racial minorities were denied positions in the fire department. Further, the dissent would allow an employer to use racial classifications in refusing to certify exam results if the employer acted in good faith and reasonably in an effort to avoid disparate impact liability.


47 *Id.* at 2681-82 (Scalia, J., concurring). Justice Alito, concurring with Justice Scalia and Thomas, joined the Court’s opinion in full, but re-examined the facts in great detail to argue that the dissenting opinion left out important facts which tended to show that the city’s real reason for scrapping the test was a desire to placate a politically important racial constituency. *Id.* at 2683 (Alito, J., joined by Scalia & Thomas, JJ., concurring).

48 *Id.* at 2689-94, 2703-07 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).
§ 21.3 Remedies in School Admissions and Student Assignment Cases

The first case testing the constitutionality of a state’s voluntary affirmative action program in the context of education was Regents of the University of California v. Bakke in 1978. In Bakke, the University of California-Davis medical school had set aside 16 places out of 100 for minorities in its first-year class. As discussed below at § 21.3 n.55, Justices Brennan, White, Marshall, and Blackmun upheld the program under intermediate review. Chief Justice Burger, along with Justices Stewart, Rehnquist, and Stevens, said that the affirmative action program was in conflict with § 601 of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d, that bars excluding anyone “on the ground of race, color, or national origin” from receiving the benefits of any program receiving federal financial assistance, as did the University. Given this 4-4 split, Justice Powell held the key vote. He joined with the Brennan group in holding that § 601 did not bar use of race except where it would be unconstitutional under the Equal Protection Clause. He then concluded that the trial court erred when it enjoined the university from according any consideration to race in its admissions process. However, he joined with the Burger group to hold the Davis program invalid.

Justice Powell reasoned that there should be strict scrutiny of all racial classifications because the 14th Amendment is a guarantee of personal rights to individuals and not to groups. Applying strict scrutiny, Justice Powell noted that there were four governmental interests that the affirmative action program purported to serve. The first government interest was “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession.” Justice Powell concluded that this was not only not a compelling governmental interest, but it was an illegitimate interest. Justice Powell stated, “If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”

The second interest was “countering the effects of societal discrimination.” With regard to this interest, Justice Powell noted that while the Court has often said that a governmental entity has a compelling interest in remedying the effects of its own prior discrimination in an identified program, remedying the effects of general “societal discrimination” against members of a particular group by other members of society generally is “an amorphous concept of injury that may be ageless in its reach into the past.” Without explicitly reaching the question of whether such an interest could be a legitimate or important interest for rational basis or intermediate scrutiny review, Justice Powell

49 438 U.S. 265, 269-72 (1978) (Powell, J., opinion, announcing the judgment of the Court); id. at 359-62, 373-79 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); id. at 412-18 (Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ., concurring in the judgment in part and dissenting in part).

50 Id. at 289-91 (Powell, J., opinion, announcing the judgment of the Court).

51 Id. at 306.
left no doubt that such an interest was not for him a compelling governmental interest that could be used at strict scrutiny. Even if it were, Justice Powell noted that a state Board of Regents, or other “isolated segments of our vast government structures are not competent to make those decisions [on whether there has been such past discrimination], at least in the absence of legislative mandates and legislatively determined criteria.” As he remarked, “That is a step we have never approved.”

The third interest considered by Justice Powell was an interest in “increasing the number of physicians who will practice in communities currently underserved.” For purposes of his analysis in *Bakke*, Justice Powell was willing to assume that such an interest was a compelling governmental interest. The problem, however, was that nothing in the record established that the Davis program was “directly related” to advancing this interest. Citing the lower court opinion in *Bakke*, Justice Powell noted, “The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an ‘interest’ in practicing in a disadvantaged community, will actually do so.” It is important to note that even if a substantial number of these doctors would in fact go back and practice in disadvantaged communities, that would only establish a “substantial relationship” between means and ends, which is adequate at intermediate review. At strict scrutiny, however, there needs to be a “direct relationship” between means and ends, such as a formal requirement that any applicant admitted under the affirmative action program promise to go back and serve a disadvantaged community for some period of time.

The fourth governmental interest analyzed by Justice Powell in *Bakke* was “the attainment of a diverse student body.” Justice Powell concluded that this “clearly is a constitutionally permissible goal for an institution of higher education.” Further, as Justice Powell noted, there is direct relationship between means and end, since “the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body.” However, with regard to the third prong of strict scrutiny review, Justice Powell concluded that the Davis program’s set-aside of 16 of 100 places for minority applicants was not the “least burdensome effective alternative” to achieve a diverse student body. Looking to models at other schools, including the Harvard College plan, Justice Powell concluded that using race as a factor in the admissions process, but rejecting a quota system, was a less burdensome alternative that would nonetheless be effective in achieving the government’s compelling interest in a racially diverse student body. Under strict scrutiny, the government must adopt the least burdensome effective alternative.

Justice Brennan, dissenting with Justices Marshall, Blackmun and White, said that racial classifications designed to serve “benign” remedial purposes should be given only intermediate review. He concluded that Davis’ articulated purpose of remedying the effects of past societal discrimination was an important interest, at least where “there is a sound basis for concluding that

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52 *Id.* at 306-10.

53 *Id.* at 310-11.

54 *Id.* at 311-20.
minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.” Further, the program was substantially related to responding to that interest, even absent any particularized finding that any applicant had been the victim of prior discrimination, because the “record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program” and “the probability of victimization is great.” Finally, the program was “closely related” to its ends, i.e., not substantially more burdensome than necessary, because it did not stigmatize anyone and race was being reasonably used in light of the program’s objectives, with only a 16% set-aside, leaving 84% of the seats to be filled under “the regular admissions program.”

Because of the vote pattern in Bakke, Justice Powell’s isolated concurrence was the controlling vote. Under Marks v. United States, the Court has said that when faced with a fragmented Court, and no majority opinion, lower courts should follow as the “controlling rationale” the opinion of those Justices “who concurred in the judgment on the narrowest grounds.” Thus, most lower courts followed Justice Powell’s approach in Bakke that student body diversity was a compelling interest and race could be used as a factor in the admissions process, but not to support a quota system. However, in 1996 in Hopwood v. Texas, the Fifth Circuit struck down an affirmative action plan at the University of Texas School of Law. The court said that Justice Powell’s view in Bakke was not binding precedent, inasmuch as it garnered only his own vote, and more recent precedents on diversity in hiring faculty for role model purposes in Wygant, noted at § 21.2 nn.28-29, or broadcast diversity in Metro Broadcasting, noted at § 21.2 nn.35-37, show that the diversity interest will not satisfy strict scrutiny. In a statement accompanying the Court’s denial of certiorari, Justice Ginsburg, joined by Justice Souter, said the issue of whether race could be used in the admissions process was of great national importance, but that the admissions program involved in the Hopwood case had long since been discontinued and would not be reinstated. The petitioners had not defended that program and instead challenged only the rationale relied on by the Court of Appeals. The Court reviews judgments, she said, not opinions, and the judgment in this case was technically moot.

The Court resolved this issue in 2003 in Grutter v. Bollinger. In Grutter v. Bollinger, excerpted below, the Court decided, contra Hopwood, that there is a compelling interest in the educational benefits that flow from having a racially diverse student body. The Court also concluded that the University of Michigan’s law school system of individualized consideration of applicants, taking race into account as a factor, was the least restrictive alternative to achieving these educational benefits, consistent with Justice Powell’s opinion in Bakke.

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55 Id. at 359-62, 373-79 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).


57 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996); id. at 1033 (Ginsburg, J., joined by Souter, J., respecting the denial of the petition for a writ of certiorari).

Grutter v. Bollinger

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to “admit a group of students who individually and collectively are among the most capable,” the Law School looks for individuals with “substantial promise for success in law school” and “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.” App. 110. More broadly, the Law School seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” Ibid. In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential “to contribute to the learning of those around them.” App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. Id., at 83-84, 114-121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. Id., at 112. The policy stresses that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems.” Id., at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Id., at 113. Nor does a low score automatically disqualify an applicant. Ibid. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. Id., at 114. So-called “soft” variables such as “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection” are all brought to bear in assessing an “applicant's likely contributions to the intellectual and social life of the institution.” Ibid.

The policy aspires to “achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.” Id., at 118. The policy does not restrict the types of diversity contributions eligible for “substantial weight” in the admissions
process, but instead recognizes “many possible bases for diversity admissions.” Id., at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to “one particular type of diversity,” that is, “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, who without this commitment might not be represented in our student body in meaningful numbers.” Id., at 120. By enrolling a “critical mass' of [underrepresented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.” Id., at 120-121.

Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 96, n.6 (1978); Bakke, 438 U.S., at 319, n.53 (opinion of Powell, J).

As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass' of minority students.” Brief for Respondent Bollinger et al. 13. The Law School's interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” Bakke, 438 U.S., at 307 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. Ibid.; Freeman v. Pitts, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake”); Richmond v. J.A. Croson Co., 488 U.S., at 507. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” App. to Pet. for Cert. 246a. These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.” Id., at 246a, 244a.

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3-4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military's ability
to fulfill its principle mission to provide national security.” Brief for Julius W. Becton, Jr., et al. as Amici Curiae 5. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. Ibid. At present, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” Ibid. (emphasis in original). To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.” Id., at 29 (emphasis in original). We agree that “[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.” Ibid.

Since Bakke, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not “abando[n] strict scrutiny,” see post, at 2374 (dissenting opinion). Rather, as we have already explained, we adhere to Adarand's teaching that the very purpose of strict scrutiny is to take such “relevant differences into account.” 515 U.S., at 228 (internal quotation marks omitted).

To be narrowly tailored, a race-conscious admissions program cannot use a quota system – it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Bakke, 438 U.S., at 315 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant's file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” Id., at 317. In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” Ibid.

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See id., at 315-316. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Ibid. Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant. Ibid.

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a “quota” is a program in which a certain fixed number or proportion of opportunities are “reserved exclusively for certain minority groups.” Richmond v. J.A. Croson Co., supra, at 496 (plurality opinion). Quotas “‘impose a fixed number or percentage which must be attained, or which cannot be exceeded,’” Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (O'Connnor, J., concurring in part and dissenting in part), and
“insulate the individual from comparison with all other candidates for the available seats,” Bakke, supra, at 317 (opinion of Powell, J.). In contrast, “a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself,” Sheet Metal Workers v. EEOC, supra, at 495, and permits consideration of race as a “plus” factor in any given case while still ensuring that each candidate “compet[e] with all other qualified applicants,” Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616, 638 (1987).

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course “some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.” Id., at 323. “[S]ome attention to numbers,” without more, does not transform a flexible admissions system into a rigid quota. Ibid. . . . Moreover, as Justice Kennedy concedes, between 1993 and 1998, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

The Chief Justice believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. But, as the Chief Justice concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.

The Law School does not . . . limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear “[t]here are many possible bases for diversity admissions,” and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. Id., at 118-119. The Law School seriously considers each “applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic – e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.” Id., at 83-84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280, n.6 (alternatives must serve the interest “‘about as well’”); Richmond v. J.A. Croson Co., 488 U.S., at 509-510 (plurality opinion) (city had a “whole array of race-neutral” alternatives because changing requirements “would have [had] little detrimental effect on the city's interests”). Narrow tailoring does, however,
require serious, good faith consideration of workable race-neutral alternatives that will achieve the
diversity the university seeks. See id., at 507 (set-aside plan not narrowly tailored where “there does
not appear to have been any consideration of the use of race-neutral means”); Wygant v. Jackson
Bd. of Ed., supra, at 280, n.6 (narrow tailoring “require[s] consideration” of “lawful alternative and
less restrictive means”).

We agree with the Court of Appeals that the Law School sufficiently considered workable
race-neutral alternatives. The District Court took the Law School to task for failing to consider
race-neutral alternatives such as “using a lottery system” or “decreasing the emphasis for all
applicants on undergraduate GPA and LSAT scores.” App. to Pet. for Cert. 251a. But these
alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted
students, or both.

We take the Law School at its word that it would “like nothing better than to find a race-neutral
admissions formula” and will terminate its race-conscious admissions program as soon as
practicable. See Brief for Respondent Bollinger et al. 34; Bakke, supra, at 317-318 (opinion of
Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary).
It has been 25 years since Justice Powell first approved the use of race to further an interest in
student body diversity in the context of public higher education. Since that time, the number of
minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43.
We expect that 25 years from now, the use of racial preferences will no longer be necessary to
further the interest approved today.

Chief Justice REHNQUIST, with whom Justice SCALIA, Justice KENNEDY, and Justice
THOMAS join, dissenting.

I agree with the Court that, “in the limited circumstance when drawing racial distinctions is
permissible,” the government must ensure that its means are narrowly tailored to achieve a
compelling state interest. Ante, at 2341; see also Fullilove v. Klutznick, 448 U.S. 448, 498 (1980)
(Powell, J., concurring) (“[E]ven if the government proffers a compelling interest to support reliance
upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental
purpose”). I do not believe, however, that the University of Michigan Law School's (Law School)
means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps
it does to achieve a “‘critical mass’” of underrepresented minority students. Brief for Respondent
Bollinger et al. 13. But its actual program bears no relation to this asserted goal. Stripped of its
“critical mass” veil, the Law School's program is revealed as a naked effort to achieve racial
balancing.

In practice, the Law School's program bears little or no relation to its asserted goal of achieving
“critical mass.” Respondents explain that the Law School seeks to accumulate a “critical mass” of
each underrepresented minority group. See, e.g., id., at 49, n.79 (“The Law School's . . . current
policy . . . provide[s] a special commitment to enrolling a ‘critical mass' of ‘Hispanics’”). But the
record demonstrates that the Law School's admissions practices with respect to these groups differ
dramatically and cannot be defended under any consistent use of the term “critical mass.”
From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve “critical mass,” thereby preventing African-American students from feeling “isolated or like spokespersons for their race,” one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a “critical mass” of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of “critical mass,” one would have to believe that the objectives of “critical mass” offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving “critical mass,” without any explanation of why that concept is applied differently among the three underrepresented minority groups.

Finally, I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School's use of race in admissions. We have emphasized that we will consider “the planned duration of the remedy” in determining whether a race-conscious program is constitutional. Fullilove, 448 U.S., at 510 (Powell, J., concurring); see also United States v. Paradise, 480 U.S. 149, 171 (1987) (“In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . duration of the relief”). Our previous cases have required some limit on the duration of programs such as this because discrimination on the basis of race is invidious.

The Court suggests a possible 25-year limitation on the Law School's current program. See ante, at 2346-2347. Respondents, on the other hand, remain more ambiguous, explaining that “[t]he Law School of course recognizes that race-conscious programs must have reasonable durational limits, and the Sixth Circuit properly found such a limit in the Law School's resolve to cease considering race when genuine race-neutral alternatives become available.” Brief for Respondent Bollinger et al. 32. These discussions of a time limit are the vaguest of assurances. In truth, they permit the Law School's use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny – that a program be limited in time – is casually subverted.

Justice KENNEDY, dissenting.

The separate opinion by Justice Powell in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-291, 315-318 (1978), is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny.
It is unfortunate . . . that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. Bakke, supra, at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination”). This Court has reaffirmed, subsequent to Bakke, the absolute necessity of strict scrutiny when the State uses race as an operative category. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny”); Richmond v. J.A. Croson Co., 488 U.S. 469, 493-494 (1989); see id., at 519 (Kennedy, J., concurring in part and concurring in judgment) (“[A]ny racial preference must face the most rigorous scrutiny by the courts”). The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by the Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, “patently unconstitutional.” It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

About 80% to 85% of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998.
The District Court relied on this uncontested fact to draw an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota. 137 F.Supp.2d 821, 851 (E.D.Mich.2001). Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987-1994, by as much as 5% or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school's miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference. See Brief for Respondent Bollinger et al. 49, n.79.

It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.

On the same day the Court decided Grutter, the Court decided in Gratz v. Bollinger that the rigid absolute point system preference of the University of Michigan undergraduate program, which gave the same extra points to aid admission to every member of a minority group, without regard to how much that individual had been the victim of prior discrimination, was unconstitutional. It was not the least burdensome effective alternative, since the undergraduate school as well could do an individualized consideration of files as done by the Law School, even if that would be more administratively burdensome given the greater number of applicants involved. Citing Croson, the Court noted that “the fact that implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”

59 539 U.S. 244, 270-76 (2003); id. at 276-80 (O’Connor, J., concurring, joined by Breyer, J., concurring only in Justice O’Connor’s opinion and in the judgment); id. at 282 (Stevens, J., joined by Souter, J., dissenting) (parties lack standing to bring the case); id. at 291 (Souter, J., joined by Ginsburg, J., dissenting, even if strict scrutiny should apply); id. at 298-302 (Ginsburg, J., joined by Souter, J., and Breyer, J., as to Part I, arguing that strict scrutiny review should be applied differently in race-based affirmative action cases, subject merely to “careful judicial inspection”).

60 Id. at 275, citing J.A. Croson Co., 488 U.S. at 508 (citing Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion) (“[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).
Considering affirmative action more broadly, under current doctrine race-based affirmative action can be justified as a remedy for prior racial discrimination. As Justice O’Connor has noted, “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it.” 61 Such discrimination can take many forms. A full account of such discrimination would take into account the burdens suffered today by the intergenerational effects of discrimination practiced against parents, grandparents, and great-grandparents in the past. Such an intergenerational transmission of inequality “shows how ‘an oppressive racial legacy continues to shape American society through the reproduction of inequality generation after generation.’” 62

For example, in the context of admissions programs to colleges and universities, alumni connections can play a large role. Potential for contributions to the university by parents of applicants with wealth can also make a difference. Better schools in middle or upper-middle class neighborhoods, or funds to take standardized test training courses, can also be an advantage in admittance to colleges and universities. The intergenerational effects of past discrimination on today’s minority individuals mean that many of them will not share equally in these advantages more widely shared by middle and upper-middle class white applicants. 63 In the workplace, a similar disparity exists in many cases in terms of connections and networking of parents and extended family members. As has been noted, “The glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.” 64

In some circumstances, critics of race-based affirmative action appear to take these advantages for granted, and thus complain about any other individual getting any kind of advantage set to equalize these effects. Some individuals tend to focus on the immediate admissions or hiring decision being made, rather than the more difficult task of working through longer chains of causation necessary to consider fully the intergenerational effects of prior racial discrimination. Nonetheless, despite this reality, there is an understandable concern that any consideration of race betrays the promise of the Equal Protection Clause that America should be a “color-blind” society. As Justice Scalia has


stated, “In the eyes of government, we are just one race here. It is American.”65 Given America’s history, however, an abrupt end to affirmative action today might well increase racial tensions rather than reduce them. Given our Nation’s history, Justice Blackmun’s remark in 1978 in Bakke that “to get beyond racism, we must first take account of race” may still be accurate today.66

Nevertheless, Justice Blackmun’s remark in Bakke concerning the need to eventually “get beyond racism” is important. This remark was echoed in Justice O’Connor’s opinion in Grutter in two ways: (1) “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”; (2) “Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches.”67 One alternative approach is represented by the so-called “Hyde Park Declaration,” a New Democrat policy statement that in 2000 recommended that the goal for 2010 should be to “shift the emphasis of affirmative action strategies” away from race-based affirmative action, which triggers strict scrutiny, toward “economic empowerment of all disadvantaged citizens,” which as a socio-economic regulation would only trigger minimum rationality review.68

The constitutional concerns with affirmative action are separate, of course, from the question whether as a policy matter affirmative action in various contexts yields more benefits than burdens. In the academic context, the core of that debate is whether the advantages in terms of access to, and degrees from, more prestigious schools outweigh the disadvantages of often worse grades than if the student had attended a less prestigious, less academically competitive school; the social “stigma” or “badge of inferiority” in some persons’ minds resulting from affirmative action admission, which can affect any minority individual whether that particular minority was admitted on that basis or not, since the precise ground of the admission decision will typically not be known; and the possible development of dependencies or attitudes that individuals are entitled to preferences.69

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66 Bakke, 438 U.S. at 407 (Blackmun, J., concurring).

67 Grutter, 539 U.S. at 342-43 (O’Connor, J., opinion for the Court).


With the replacement of Justice O’Connor by Justice Alito in 2006, Justice Kennedy will likely become the critical swing vote on race-based affirmative action cases in the next few years. In his dissent in *Grutter*, Justice Kennedy indicated less willingness to defer to government decisions than Justice O’Connor, and a greater willingness to conclude that programs in practice are adopting more burdensome kinds of quota systems, rather than more permissible kinds of factor analysis. This supports even more the wisdom of adopting “Hyde Park Declaration” kind of affirmative action, as well as suggesting *Grutter*’s approval of affirmative action based on student body diversity will not likely be extended very far, either in the educational context or in other areas of the law, such as public employment.

Justice Kennedy did apply a hard look to the race-based affirmation action programs in 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1* (consolidating appeals from *Seattle School District No. 1*, and *Meredith v. Jefferson County Board of Education*). While acknowledging that diversity in a student body is a compelling interest, Justice Kennedy concluded that the affirmative action programs considered in this case either did not clearly indicate whether they were using race as a factor, which would be permissible under *Grutter v. Bollinger*, or race as an absolute point preference or quota or set-aside, which would be impermissible under *Gratz v. Bollinger* (the Jefferson County case), or clearly were using race in an impermissible manner, with a blunt “white/non-white” classification system (the *Seattle School District No. 1* case). Justices Scalia, Thomas, and Alito, the formalist Justices on the Court, along with Holmesian Chief Justice Roberts, did not specifically conclude, as did Justice Kennedy, that racial diversity in educational settings was a compelling interest. They avoided that issue by agreeing with Justice Kennedy that the programs here were not the least restrictive effective alternatives under strict scrutiny review.

The liberal instrumentalists on the Court – Justices Stevens, Ginsburg, and Breyer – were willing to permit the school districts to use race as more than just a factor, just as they had been so willing in *Gratz*. As in *Gratz*, they were joined by Justice Souter. While no longer arguing for intermediate review for race-based affirmation action, they suggested they would apply a less vigorous form of strict scrutiny, something one could perhaps call “loose strict scrutiny.” While requiring compelling government interests to regulate, “loose strict scrutiny” only requires narrowly drawn regulations not substantially more burdensome than necessary, the intermediate standard of tailoring, not the least restrictive effective alternative analysis of regular strict scrutiny review. For Justices Stevens, Souter, Ginsburg, and Breyer, this difference would be justified based on a difference between use

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71 On refusing to adopt student body diversity as a compelling interest, see *id.* at 2755-59 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., as to Part III(B)). On agreeing the programs were unconstitutional in any event, see *id.* at 2759-61 (Roberts, C.J., opinion for the Court, joined by Scalia, Kennedy, Thomas & Alito, JJ.).
of race-conscious criteria to keep the races apart (regular strict scrutiny should apply), and use of race-conscious criteria to bring the races together (loose strict scrutiny should apply). 72

The ultimate holdings in Seattle School District No. 1 indicate even more so the wisdom of moving to “Hyde Park Declaration” socio-economic affirmative action. Socio-economic affirmative action, as a social or economic regulation, will be tested only by minimum rationality review, rather than the strict scrutiny given to race-based affirmative action. Even Chief Justice Robert’s four-Justice plurality in Seattle School District No. 1 indicated a willingness to consider as legitimate a broader concept of socio-economic diversity based upon “‘many possible bases for diversity admissions, [such as] admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.’”73

Per Justice Kennedy, the Court underscored in 2013 in Fisher v. University of Texas at Austin,74 excerpted below, that strict scrutiny in a race-based affirmative action case must be strict, and conform to strict scrutiny analysis, where the state has the burden to prove the program directly advances a compelling government interest, and the government’s program is narrowly tailored because it uses the least burdensome effective alternative, and thus is necessary. A court cannot rely on “good faith” assurances by the state that the program “uses race in a permissible way,” but must instead give “close analysis to the evidence of how the program works in practice.”

Fisher v. University of Texas at Austin
133 S. Ct. 2411 (2013)

Justice KENNEDY delivered the opinion of the Court.

The University of Texas at Austin considers race as one of various factors in its undergraduate admissions process. Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a “critical mass.” Petitioner, who is Caucasian, sued the University after her application was rejected. She contends that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.

The parties asked the Court to review whether the judgment below was consistent with “this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including Grutter v. Bollinger, 539 U.S. 306 (2003).” Pet. for Cert. i. The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in Grutter and

72 Id. at 2816-20 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the University was incorrect. That decision is vacated, and the case is remanded for further proceedings.

Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive. In 2008, when petitioner sought admission to the University's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled. Petitioner was denied admission.

In recent years the University has used three different programs to evaluate candidates for admission. The first is the program it used for some years before 1997, when the University considered two factors: a numerical score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and the applicant's race. In 1996, this system was held unconstitutional by the United States Court of Appeals for the Fifth Circuit. It ruled the University's consideration of race violated the Equal Protection Clause because it did not further any compelling government interest. Hopwood v. Texas, 78 F.3d 932, 955 (1996).

The second program was adopted to comply with the Hopwood decision. The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with the Academic Index. This “Personal Achievement Index” (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline in minority enrollment after Hopwood, the University also expanded its outreach programs.

The Texas State Legislature also responded to the Hopwood decision. It enacted a measure known as the Top Ten Percent Law, codified at Tex. Educ. Code Ann. § 51.803 (West 2009). Also referred to as H.B. 588, the Top Ten Percent Law grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-Hopwood AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-Hopwood and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African-American and 14.5% Hispanic.

Following this Court's decisions in Grutter v. Bollinger, supra, and Gratz v. Bollinger, 539 U.S. 244 (2003), the University adopted a third admissions program, the 2004 program in which the
University reverted to explicit consideration of race. This is the program here at issue. In *Grutter*, the Court upheld the use of race as one of many “plus factors” in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.

The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions (Proposal). Supp. App. 1a. The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called “anecdotal” reports from students regarding their “interaction in the classroom.” The Proposal concluded that the University lacked a “critical mass” of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.

To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college – such as Liberal Arts or Engineering – admits students separately. So a student is considered initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.

Petitioner applied for admission to the University's 2008 entering class and was rejected. She sued the University and various University officials in the United States District Court for the Western District of Texas. She alleged that the University's consideration of race in admissions violated the Equal Protection Clause. The parties cross-moved for summary judgment. The District Court granted summary judgment to the University. The United States Court of Appeals for the Fifth Circuit affirmed. It held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan. 631 F.3d 213, 217-218 (2011).

Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc. See 644 F.3d 301, 303 (C.A.5 2011) [Ed.: 9-7 decision] (per curiam). Petitioner sought a writ of certiorari. The writ was granted. 132 S.Ct. 1536 (2012).

Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor
in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body: *Bakke, Gratz,* and *Grutter.* We take those cases as given for purposes of deciding this case.

Justice Powell identified one compelling interest [in *Bakke*] that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a compelling interest, because a university's “broad mission [of] education” is incompatible with making the “judicial, legislative, or administrative findings of constitutional or statutory violations” necessary to justify remedial racial classification. Id., at 307-309.

The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is “a special concern of the First Amendment.” Id., at 312. Part of “‘the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,’” and this . . . leads to the question of “‘who may be admitted to study.’” *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment).

Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. “It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Bakke,* 438 U.S., at 315 (separate opinion).

In *Gratz* and *Grutter,* the Court endorsed the precepts stated by Justice Powell. In *Grutter,* the Court reaffirmed his conclusion that obtaining the educational benefits of “student body diversity is a compelling state interest that can justify the use of race in university admissions.” [539 U.S.] at 325.

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. “Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.” *Gratz,* supra, at 275. “To be narrowly tailored, a race-conscious admissions program cannot use a quota system,” *Grutter,* 539 U.S., at 334, but instead must “remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application,” id., at 337. Strict scrutiny requires the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.” *Bakke,* 438 U.S., at 305 (opinion of Powell, J.) (internal quotation marks omitted).
A university is not permitted to define diversity as “some specified percentage of a particular group merely because of its race or ethnic origin.” Bakke, supra, at 307 (opinion of Powell, J.). “That would amount to outright racial balancing, which is patently unconstitutional.” Grutter, supra, at 330. “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 732 (2007).

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. Grutter made clear that it is for the courts, not for university administrators, to ensure that “[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” 539 U.S., at 333 (internal quotation marks omitted). True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in Grutter, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.” Id., at 337.

Narrow tailoring also requires that the reviewing court verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity. Bakke, supra, at 305. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” strict scrutiny does require a court to examine with care, and not defer to, a university's “serious, good faith consideration of workable race-neutral alternatives.” See Grutter, 539 U.S., at 339-340 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If “a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,” Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280, n.6 (1986) (quoting Greenawalt, Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions, 75 Colum. L.Rev. 559, 578-579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only “whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith.” 631 F.3d, at 236. And in considering such a challenge, the court would “presume the University acted in good faith” and place on petitioner the burden of rebutting that presumption. Id., at 231-232. The Court of Appeals held that to “second-guess the merits” of this aspect of the University's decision was a task it was “ill-equipped to perform” and that it would attempt only to “ensure that [the University's] decision to adopt a race-conscious admissions policy
followed from [a process of] good faith consideration.” Id., at 231. The Court of Appeals thus concluded that “the narrow-tailoring inquiry – like the compelling-interest inquiry – is undertaken with a degree of deference to the University.” Id., at 232. Because “the efforts of the University have been studied, serious, and of high purpose,” the Court of Appeals held that the use of race in the admissions program fell within “a constitutionally protected zone of discretion.” Id., at 231.

These expressions of the controlling standard are at odds with Grutter's command that “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” 539 U.S., at 326 (quoting Adarand Constructors, Inc. v. Penã, 515 U.S. 200, 227 (1995)). In Grutter, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed “serious, good faith consideration of workable race-neutral alternatives.” 539 U.S., at 339. The parties do not challenge, and the Court therefore does not consider, the correctness of that determination.

Grutter did not hold that good faith would forgive an impermissible consideration of race. It must be remembered that “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.” Croson, 488 U.S., at 500. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

Justice KAGAN took no part in the consideration or decision of this case.

Justice SCALIA, concurring.


Justice THOMAS, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. Ante, at 2415. I write separately to explain that I would overrule Grutter v. Bollinger, 539 U.S. 306 (2003), and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

My view of the Constitution is the one advanced by the plaintiffs in Brown: “[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” Tr. of Oral Arg. in Brown v. Board of Education, O.T. 1952, No. 8, p. 7; see also Juris. Statement in Davis v. School Bd. of Prince Edward Cty., O.T. 1952, No. 191, p. 8 (“[W]e take the unqualified position that the Fourteenth Amendment
has totally stripped the state of power to make race and color the basis for governmental action”); Brief for Appellants in Brown v. Board of Education, O.T. 1952, No. 8, p. 5 (“The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone”); Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in Brown v. Board of Education, O.T. 1953, p. 65 (“That the Constitution is color blind is our dedicated belief”). The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that racial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful.

Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as Amici Curiae 3-4, and n.4. Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991. Ibid. [FN 4: The lowest possible score on the SAT is 600, and the highest possible score is 2400.]

Tellingly, neither the University nor any of the 73 amici briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L.Rev. 1583, 1605-1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its “beneficiaries” are underperforming in the classroom). “It is a fact that in virtually all selective schools . . . where racial preferences in admission is practiced, the majority of [black] students end up in the lower quarter of their class.” S. Cole & E. Barber, Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students 124 (2003). There is no reason to believe this is not the case at the University.

The University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, Affirmative Action Around the World 145-146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these
overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

The Court of Appeals believed that the University needed to enroll more blacks and Hispanics because they remained “clustered in certain programs.” 631 F.3d 213, 240 (C.A.5 2011) ("[N]early a quarter of the undergraduate students in [the University's] College of Social Work are Hispanic, and more than 10% are [black]. In the College of Education, 22.4% of students are Hispanic and 10.1% are [black]"). But racial discrimination may be the cause of, not the solution to, this clustering. There is some evidence that students admitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools. See, e.g., Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699–701 (1996). These students may well drift towards less competitive majors because the mismatch caused by racial discrimination in admissions makes it difficult for them to compete in more rigorous majors. [FN 5: The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering is well documented. See, e.g., National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate-Origin Institutions of Black S & E Doctorate Recipients 6 (2008) (Table 2) (showing that, from 1997-2006, Howard University had more black students who went on to earn science and engineering doctorates than any other undergraduate institution, and that 7 other historically black colleges ranked in the top 10); American Association of Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19) (showing that, in 2011, Xavier University had more black students who went on to earn medical degrees than any other undergraduate institution and that Howard University was second).]

Moreover, the University's discrimination “stamp[s] [blacks and Hispanics] with a badge of inferiority.” Adarand, 515 U.S., at 241 (opinion of Thomas, J.). It taints the accomplishments of all those who are admitted as a result of racial discrimination. . . . And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. “When blacks [and Hispanics] take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement.” See Grutter, 539 U.S., at 373 (opinion of Thomas, J.).

Justice GINSBURG, dissenting.

The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316-317 (1978). The University has steered clear of a quota system like the one struck down in Bakke, which excluded all nonminority candidates from competition for a fixed number of seats. See id., at 272-275, 315, 319-320 (opinion of Powell, J.). See also Gratz v. Bollinger, 539 U.S. 244, 293 (2003) (Souter, J., dissenting) (“Justice Powell's opinion in [ Bakke ] rules out a racial quota or
set-aside, in which race is the sole fact of eligibility for certain places in a class."). And, like so many educational institutions across the Nation, the University has taken care to follow the model approved by the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). See 645 F.Supp.2d 587, 609 (W.D.Tex.2009) (“[T]he parties agree [the University’s] policy was based on [Grutter].”)

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. See Gratz, 539 U.S., at 303-304, n.10 (dissenting opinion).

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4-5 (Apr. 15, 1997) (“Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities.”). It is race consciousness, not blindness to race, that drives such plans. As for holistic review, if universities cannot explicitly include race as a factor, many may “resort to camouflage” to “maintain their minority enrollment.” Gratz, 539 U.S., at 304 (Ginsburg, J., dissenting).

The Top Ten plan (modified since *Fisher* to fill up to 75% of each entering class, which usually means top 7-8%) may actually increase the mismatch of competencies that was a concern of Justice Thomas in his dissent in *Fisher*, as the top 7-10% of minority graduates from inner city schools may be less academically prepared than the top 10-20% of minorities attending private, suburban, charter, or other more challenging schools, but they likely will not be admitted to the University of Texas unless the kind of “race as a factor” approach at issue in *Fisher* is allowed. On remand, a 2-1 panel of the Fifth Circuit upheld the program, viewing it as consistent with *Grutter*. *Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), aff’d, 136 S. Ct. 2198 (2016) (constitutional based on how the program operated when the case was brought in 2008; school must continue to police its operation to ensure it is constitutional); *id.* at 2215-16 (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting) (university has not identified what they mean by a “critical mass” for diversity, and thus have not shown the program directly advanced that end); *id.* at 2215 (Thomas, J., dissenting) (use of race in higher education *per se* unconstitutional; *Grutter* should be overruled).

Following the Court’s holding in *Grutter* and *Gratz*, Michigan voters passed a constitutional amendment to the Michigan Constitution preventing the state from adopting race-base affirmative action programs at state schools. The Sixth Circuit held that amendment unconstitutional, as it would make it harder for minorities to overturn that decision than if the change were just statutory. In April, 2014, a 6-2 Supreme Court reversed the Sixth Circuit and held in *Schuette v. Coalition to Defend Affirmative Action* that the Michigan constitutional referendum, which repealed existing affirmative action programs in public education, employment, and contracting, was permissible and consistent with equal protection of the laws, as discussed at § 20.4 n.80.
§ 21.4 Remedies in Redistricting Cases

In recent years, the Court has considered a number of cases dealing with the issue of racial “affirmative action” redistricting of voting districts. This issue became more prevalent because in the 1990s and 2000s a combination of Republican legislators and minority Democratic legislators worked together to create a number of majority-minority districts, particularly in the South. The minority Democratic legislators voted for the districting, as they would create more minorities being elected from those districts. Republicans legislators voted for them, as by grouping minorities in a few districts, that would increase Republican electoral chances in all the other districts in the state.

In 1993, in Shaw v. Reno (Shaw I), id. the Court held that a claim is stated under the Equal Protection Clause by a voter who alleges that a state redistricting plan has no rational explanation except as an effort to separate voters on the basis of race. In 1995, in Miller v. Johnson, a 5-4 Court held that to trigger strict scrutiny “a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, continuity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.” Applying that test, the Court approved a finding that the district in question was drawn in response to pressure from the Justice Department to create a majority black district, and that there were no race neutral reasons for the proposed district, such as grouping urban districts together, or following geographic boundaries like rivers or mountains, or following traditional political county lines.

In the following year, by the same 5-4 vote, the Court invalidated four more majority-minority districts created after the 1990 census. In the North Carolina case, Shaw v. Hunt (Shaw II), Chief Justice Rehnquist wrote that since race was the “predominant factor” in drawing the district, strict scrutiny applied. The Chief Justice did not resolve the question whether complying with § 2 of the Voting Rights Act, given its concern with dilution of minority voting strength, could be a compelling interest because an additional majority-black district in the Northern part of the state was not required by § 2 in order to advance black and Native American voting strength in the Southern part of the state. Justice Stevens, joined by Justices Ginsburg and Breyer, said strict scrutiny was not appropriate and the state’s action was justified by a desire to facilitate the election of representatives of a previously disadvantaged minority. Justice Souter, joined by Justices Ginsburg & Breyer, indicated that the Court should abandon scrutiny in this area as being unworkable in practice.

75 509 U.S. 630, 641-49 (1993); id. at 659 (White, J., joined by Blackmun & Stevens, JJ., dissenting); id. at 679 (Souter, J., dissenting).


78 Id. at 918 (Stevens, joined by Ginsburg & Breyer, JJ., dissenting); id. at 951 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).
In a companion case, *Bush v. Vera*, a plurality opinion by Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, purported to apply strict scrutiny to strike down three newly drawn congressional districts because legitimate redistricting principles were subordinated to race. Strict scrutiny was not satisfied because § 2 of the Voting Rights Act does not require a state to create, on predominantly racial lines, a district that is not reasonably compact. Although generally applying a strict scrutiny compelling governmental interest analysis to the case, Justice O’Connor “reject[ed], as impossibly stringent, the District Court’s view of the narrow tailoring requirement, that ‘a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria,’” and instead adopted the intermediate analysis that the racial redistricting only not be “substantially more [burdensome] than is ‘reasonably necessary.’” This decision thus adopted a second kind of strict scrutiny review, what can be called “loose” strict scrutiny, as suggested might be appropriate for race-based affirmative action by the dissent in *Seattle School District No. 1*, at § 21.3 n.72. This level of scrutiny adopts the first two elements of strict scrutiny review, but waters down element three to an intermediate level of inquiry. Justice Thomas, concurring with Justice Scalia, said that the intentional creation of a majority-minority district means that the district was created “because of” and not merely “in spite of” racial demographics. When that happens, traditional race-neutral districting principles are necessarily subordinated, without any further finding that race was a “predominant” factor in the district’s creation. While this approach reflects the usual rule that discriminatory intent can be found based on race being a “motivating” factor in the decision, discussed at § 20.4 n.56, the requirement that race be a “predominant” factor reflects the precedents in racial redistricting cases. Justice Kennedy also noted a concern with the predominant factor test.

In *Easley v. Cromartie*, Justice Breyer said that a party would have a stronger case to prove racial considerations were a predominant factor in the districting decision if they could show that the legislature could have achieved its legitimate political objectives in alternative ways that are consistent with traditional districting principles and those districting alternatives would have brought about significantly greater racial balance. *Cf.* Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017) (challengers do not have to show actual conflict with traditional redistricting principles to trigger heightened scrutiny, as long as they can show race was a “predominant” factor in how district was drawn). For more recent cases on racial redistricting, see CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (2018 Supplement, at § 26.2.1.5, n.294) (page 2095) (available at: http://libguides.stcl.edu/kelsomaterials) (including discussion of the recent case of *Abbott v. Perez*, 138 S. Ct. 2305 (2018)).

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79 517 U.S. 952, 977, 979 (1996); *id.* at 999-1000 (Thomas, J., joined by Scalia, J., concurring in the judgment); *id.* at 996-99 (Kennedy, J., concurring).

80 532 U.S. 234, 241-58 (2001). Justice Thomas, dissenting with Chief Justice Rehnquist and Justices Scalia and Kennedy, replied that the Court had improperly engaged in its own fact finding enterprise. Further, it was unnecessary to impose a new burden on challengers to show that districting alternatives would have brought about significantly greater racial balance. *Id.* at 259-60, 263 n.4 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).
CHAPTER 22: GENDER DISCRIMINATION AND INTERMEDIATE REVIEW

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§ 22.1 Rational Basis Review for Gender Discrimination Prior to 1970

The Equal Protection Clause was not ratified until 1868. In the first Equal Protection case in 1873, the Court doubted in the *Slaughter-House Cases*, discussed at § 14.3.1(B) n.55, "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."\(^1\) However, in 1885, based on the literal text of the Equal Protection Clause, which is not limited to racial discrimination, the Court brought the full range of legislative classifications within the clause by requiring in *Barbier v. Connolly*\(^2\) all legislation not to be “arbitrary” but a legitimate exercise of the state’s “police power.”

During the late 1800s, there were no Equal Protection cases that applied this “arbitrariness” test to gender classifications. It seems clear, however, that classifications relating to women would have been found reasonable, and not arbitrary, because men and women were not considered to stand as equal before the law. For example, in many states, until the late 1800s, a married woman lacked the legal capacity to contract or convey property. Although African-Americans were given the right to vote in 1870, the 19th Amendment giving women the right to vote was not ratified until 1920. In *Bradwell v. Illinois*,\(^3\) an 1873 case brought under the Privileges or Immunities Clause, the Court upheld a refusal to license women to practice law, with Justice Bradley reflecting the Court’s conservative deference to customs and traditions view that the “destiny and mission of women are to fulfil the noble and benign offices of wife and mother,” not to have a career, such as practicing

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1 83 U.S. (16 Wall.) 36, 81(1873).


3 83 U.S. 130, 141 (1873) (Bradley, J., concurring).
law. Responding to a Due Process challenge, the Court in 1908 in Muller v. Oregon,\textsuperscript{4} excerpted at § 17.2, sustained a statute barring factory employment of women for more than 10 hours a day, based upon a concern for the health of women, which was viewed as more frail than that of men. That concern for “women’s health” was widely shared at the time. As the Court noted in Muller:

In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin. FN\textsuperscript{†}

FN\textsuperscript{†} The following legislation of the states imposes restriction in some form or another upon the hours of labor that may be required of women: Massachusetts: 1874, Rev. Laws 1902, chap. 106, § 24; Rhode Island: 1885, Acts and Resolves 1902, chap. 994, p. 73; Louisiana: 1886, Rev. Laws 1904, vol. 1, § 4, p. 989; Connecticut: 1887, Gen. Stat. Revision 1902, § 4691; Maine: 1887, Rev. Stat. 1903, chap. 40, § 48; New Hampshire: 1887, Laws 1907, chap. 94, p. 95; Maryland: 1888, Pub. Gen. Laws 1903, art. 100, § 1; Virginia: 1890, Code 1904, title 51A, chap. 178A, § 3657 b; Pennsylvania: 1897, Laws 1905, No. 226, p. 352; New York: 1899, Laws 1907, chap. 507, § 77, subdiv. 3, p. 1078; Nebraska: 1899, Comp. Stat. 1905, § 7955, p. 1986; Washington: Stat. 1901, chap. 68, § 1, p. 118; Colorado: Acts 1903, chap. 138, § 3, p. 310; New Jersey: 1892, Gen. Stat. 1895, p. 2350, §§ 66. 67; Oklahoma: 1890, Rev. Stat. 1903, chap. 25, art. 58, § 729; North Dakota: 187, Rev. Code 1905, § 9440; South Dakota: 1877, Rev. Code (Penal Code § 764), p. 1185; Wisconsin: 1897, Code 1898, § 1728; South Carolina: Acts 1907, No. 233. In foreign legislation Mr. Brandeis calls attention to these statutes: Great Britain, 1844: Law 1901, 1 Edw. VII. chap. 22. France, 1848: Act No. 2, 1892, and March 30, 1900. Switzerland, Canton of Glarus, 1848: Federal Law 1877, art. 2, § 1. Austria, 1855; Acts 1897, art. 96 a, §§ 1-3. Holland, 1889; art. 5, § 1. Italy, June 19, 1902, art. 7. Germany, Laws 1891. Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would, of course, take too much space to give these reports in detail. . . . Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: “The reasons for the reduction of the working day to ten hours – (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home – are all so important and so far reaching that the need for such reduction need hardly be discussed.”\textsuperscript{5}

\textsuperscript{4} 208 U.S. 412, 418-23 (1908). As noted at § 17.1.2 n.16, in practice the law favored men as employees over women. See generally Diane Leenheer Zimmerman, Am I Caught in a Time Warp or Not: Reflections on Pornography and Purity, 27 Seton Hall L. Rev. 335, 348 n.44 (1997).

\textsuperscript{5} 208 U.S. at 419-20. The use of social science statistics in constitutional litigation became famous because of this case, ushering in use of the phrase a “Brandeis brief.” Louis Brandies, a progressive supporter of minimum wage and maximum hour laws for men, women, and children, was nominated by President Wilson and confirmed as a Supreme Court Justice in 1916.
During the latter part of the formalist era, as in 1920 in *F.S. Royster Guano Co. v. Virginia*, the Court began to phrase the test under the Equal Protection Clause for reviewing economic classifications as whether the classification rested on some ground of difference "having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Although such a difference was found in *Muller*, it was not found in 1923 in *Adkins v. Children's Hospital*. There, the Court invalidated a statute setting minimum wages for women and children in the District of Columbia. The Court said that due to changes in the contractual, political, and civil status of women, “culminating in the Nineteenth Amendment,” which granted women the right to vote in 1920, the differences between men and women, with the exception of physical differences, had come almost to "the vanishing point."

As part of rejecting the formalist-era *Lochner* approach to liberty of contract, the Holmesian-era Court did overrule *Adkins* in *West Coast Hotel v. Parrish*, as discussed at § 17.1.2 nn.25-28. This overruling did not involve any aspect of gender discrimination, however, as the Court merely held that a minimum wage law applicable to both men and women did not violate the Due Process Clause of the 14th Amendment. During the Holmesian era, the Court applied minimum rationality review to classifications in economic and social legislation without regard to whether the statute involved gender discrimination. For example, in *Goesaert v. Cleary*, the Court in 1948 upheld a Michigan statute that barred a female from being licensed as a bartender unless she was the wife or daughter of the male owner of the bar. The test articulated by the Court was whether there was any "basis in reason" for a discrimination between men and women. Applying that test, the Court concluded that Michigan could bar women from being bartenders in order to deal with perceived “moral and social problems” from a woman being a barmaid “without such protecting oversight” of husband or father.

During the early part of the instrumentalist era, the Court continued its Holmesian deferential approach toward gender classifications. For example, in 1961 in *Hoyt v. Florida*, the Court upheld a law making males eligible for jury duty unless they requested an exemption, but granted females an exemption unless they waived it and registered their desire to be placed on the jury list. The Court said that women are still regarded as the center of the home and family life.

Major changes occurred during the 1960s. The Equal Pay Act of 1963 barred employers in the private sector from sex discrimination. In addition to its provision on race discrimination, Title VII of the Civil Rights Act of 1964 made it illegal for any employer to discriminate against anyone with respect to "compensation, terms, conditions, or privileges of employment" because of the person's

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6 253 U.S. 412, 415 (1920).
7 261 U.S. 525, 553 (1923).
8 300 U.S. 379, 390-99 (1937).
9 335 U.S. 464, 466-67 (1948).
sex, unless there were bona fide occupational qualifications. In 1967, President Johnson issued an executive order barring sex discrimination by the federal government or by government contractors and subcontractors. The Equal Rights Amendment (ERA), first introduced in 1923, and passed in limited form by the Senate in 1950, was approved by the House in 1971, and was approved by the Senate and sent to the states in 1972. Legally, the ERA would have made gender classifications, like race, subject to strict scrutiny review. Although ratified at some point by 35 states, three short of the 3/4 needed to ratify it, the ERA was not ratified by the time of its extended deadline – June 30, 1982. The 15 states that refused to ratify the amendment were 10 Southern states – Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, and Virginia – along with Arizona, Illinois, Nevada, Oklahoma, and Utah.


The statutes and executive orders of the 1960s and early 1970s presaged judicial reform. Prior to 1971, the Supreme Court continued to apply minimum rationality review to gender classifications. That changed during the 1970s, as indicated in the trilogy of cases excerpted below, Reed v. Reed, Frontiero v. Richardson, and Craig v. Boren.

Reed v. Reed
404 U.S. 71 (1971)

Chief Justice BURGER delivered the opinion of the Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated sometime prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of Ada County, seeking appointment as administratrix of her son's estate. Prior to the date set for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15-312 and 15-314 of the Idaho Code as the controlling statutes and read those sections as compelling a preference for Cecil Reed because he was a male.

See generally Linda J. Wharton, State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination, 36 Rutgers L.J. 1201, 1214-15 (2005) (ERA would provide courts with "direct authority" to "treat sex-based discrimination as highly suspect"); id. at 1202, 1227-47 (22 states have some form of ERA protection in their state Constitutions, and most apply strict scrutiny).

Section 15-312 designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, that section lists 11 classes of persons who are so entitled and provides, in substance, that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "the father or mother" of the person dying intestate.[FN 2: Section 15-312 provides as follows: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: 1. The surviving husband or wife or some competent person whom he or she may request to have appointed. 2. The children. 3. The father or mother. 4. The brothers. 5. The sisters. 6. The grandchildren. 7. The next of kin entitled to share in the distribution of the estate. 8. Any of the kindred. 9. The public administrator. 10. The creditors of such person at the time of death. 11. Any person legally competent. If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate."] Under this section, then, appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 15-314 provides, however, that "of several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15-312 and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant "by reason of Section 15-314 of the Idaho Code." In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise "equally entitled."

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15-314. In dealing with the attack, that court held that the challenged section violated the Equal Protection Clause of the Fourteenth Amendment and was, therefore, void; the matter was ordered "returned to the Probate Court for its determination of which of the two parties" was better qualified to administer the estate.

This order was never carried out, however, for Cecil Reed took a further appeal to the Idaho Supreme Court, which reversed the District Court and reinstated the original order naming the father administrator of the estate. In reaching this result, the Idaho Supreme Court first dealt with the governing statutory law and held that under § 15-312 "a father and mother are 'equally entitled' to letters of administration," but the preference given to males by § 15-314 is "mandatory" and leaves no room for the exercise of a probate court's discretion in the appointment of administrators. Having thus definitively and authoritatively interpreted the statutory provisions involved, the Idaho Supreme Court then proceeded to examine, and reject, Sally Reed's contention that § 15-314 violates the Equal Protection Clause by giving a mandatory preference to males over females, without regard to their individual qualifications as potential estate administrators. 465 P. 2d 635.
Sally Reed thereupon appealed for review by this Court pursuant to 28 U.S.C. § 1257 (2), and we noted probable jurisdiction. 401 U.S. 934. Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.

[FN 4: We note that § 15-312, set out in n.2, supra, appears to give a superior entitlement to brothers of an intestate (class 4) than is given to sisters (class 5). The parties now before the Court are not affected by the operation of § 15-312 in this respect, however, and appellant has made no challenge to that section. We further note that on March 12, 1971, the Idaho Legislature adopted the Uniform Probate Code, effective July 1, 1972. Idaho Laws 1971, c. 111, p. 233. On that date, §§ 15-312 and 15-314 of the present code will, then, be effectively repealed, and there is in the new legislation no mandatory preference for males over females as administrators of estates.]

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under § 15-312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15-312. In such situations, § 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15-312, seek letters of administration and thereby present the probate court "with the issue of which one should be named." The court also concluded that where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by
the legislature to resolve an issue that would otherwise require a hearing as to the relative merits. . . of the two or more petitioning relatives . . ." 465 P. 2d, at 638.

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated. . . . By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. Royster Guano Co. v. Virginia, supra.

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**Frontiero v. Richardson**  
411 U.S. 677 (1973)

Justice BRENNAN announced the judgment of the Court and an opinion in which Justice DOUGLAS, Justice WHITE, and Justice MARSHALL join.

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U.S.C. § 401 (1); 10 U.S.C. § 1072 (2)(A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. 37 U.S.C. § 401; 10 U.S.C. § 1072 (2). Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the [Equal Protection Component of the] Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the . . . statutes making this distinction. 341 F.Supp. 201 (1972). We noted probable jurisdiction. 409 U.S. 840 (1972). We reverse.

In an effort to attract career personnel through reenlistment, Congress established, in 37 U.S.C. § 401 et seq., and 10 U.S.C. § 1071 et seq., a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry. Thus, under 37 U.S.C. § 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters" and, under 10 U.S.C. § 1076, a member's dependents are provided comprehensive medical and dental care.
Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support. Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment. In essence, appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family – and the wife typically the "dependent" partner – "it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." 341 F.Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." Ibid.

At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed, 404 U.S. 71 (1971).

In Reed, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. . . . Since the parties, as parents of the deceased, were members of the same entitlement class, the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment.

The Court noted that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U.S., at 75. Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. See Flemming v. Nestor, 363 U.S. 603, 611 (1960).
In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since "men [are] as a rule more conversant with business affairs than . . . women." Indeed, appellee maintained that "it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are." And the Idaho Supreme Court, in upholding the constitutionality of this statute, suggested that the Idaho Legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women."

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S., at 77. The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." Id., at 76. This departure from "traditional" rational-basis analysis with respect to sex-based classifications is clearly justified.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . .

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Myrdal, An American Dilemma 1073 (20th anniversary ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right – which is itself "preservative of other basic civil and political rights" – until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena. See generally K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).
Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration. Cf. Oregon v. Mitchell, 400 U.S. 112, 240, 248-249 (1970) (opinion of Brennan, White, and Marshall, JJ.); Katzenbach v. Morgan, 384 U.S. 641, 648-649 (1966).

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." Reed v. Reed, 404 U.S., at 77.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government
argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionable.

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See Shapiro v. Thompson, 394 U.S. 618 (1969); Carrington v. Rash, 380 U.S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." Reed v. Reed, 404 U.S., at 77, 76.

Justice STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U.S. 71.

Justice POWELL, with whom THE CHIEF JUSTICE and Justice BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Justice Brennan, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, 404 U.S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of Reed and reserve for the future any expansion of its rationale.
There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the [plurality] has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Justice REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, Frontiero v. Laird, 341 F. Supp. 201 (1972) [(concluding, inter alia, that if unconstitutional the “Court would be faced with a Hobson-like choice in fashioning a remedy: either strike down the conclusive presumption in favor of married service men, forcing the services to invest the added time and expense necessary to administer the law accurately, or require the presumption to be applied to both male and female married members, thereby abandoning completely the concept of dependency in fact upon which Congress intended to base the extension of benefits.”)].

Craig v. Boren
429 U.S. 190 (1976)

Justice BRENNAN delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute, Okla. Stat., Tit. 37, §§ 241 and 245 (1958 and Supp. 1976), prohibits the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

We first address a preliminary question of standing. Appellant Craig attained the age of 21 after we noted probable jurisdiction. Therefore, since only declaratory and injunctive relief against enforcement of the gender-based differential is sought, the controversy has been rendered moot as to Craig. See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974). [FN 2: Appellants did not seek class certification of Craig as representative of other similarly situated males 18-20 years of age. See, e.g., Sosna v. Iowa, 419 U.S. 393, 401 (1975).] The question thus arises whether appellant Whitener, the licensed vendor of 3.2% beer, who has a live controversy against enforcement of the statute, may rely upon the equal protection objections of males 18-20 years of age to establish her claim of unconstitutionality of the age-sex differential. We conclude that she may.
Whitener has established independently her claim to assert *jus tertii* standing. The operation of §§ 241 and 245 plainly has inflicted "injury in fact" upon appellant sufficient to guarantee her "concrete adverseness," Baker v. Carr, 369 U.S. 186, 204 (1962), and to satisfy the constitutionally based standing requirements imposed by Art. III. The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, "sanctions and perhaps loss of license." Tr. of Oral Arg. 41. This Court repeatedly has recognized that such injuries establish the threshold requirements of a "case or controversy" mandated by Art. III. See, e.g., Singleton v. Wulff, [428 U.S.] at 113 (doctors who receive payments for their abortion services are classically adverse" to government as payer).

Before 1972, Oklahoma defined the commencement of civil majority at age 18 for females and age 21 for males. Okla. Stat., Tit. 15, § 13 (1972 and Supp. 1976). In contrast, females were held criminally responsible as adults at age 18 and males at age 16. Okla. Stat., Tit. 10 § 1101(a) (Supp. 1976). After the Court of Appeals for the Tenth Circuit held in 1972, on the authority of *Reed v. Reed*, 404 U.S. 71 (1971), that the age distinction was unconstitutional for purposes of establishing criminal responsibility as adults, Lamb v. Brown, 456 F. 2d 18, the Oklahoma Legislature fixed age 18 as applicable to both males and females. Okla. Stat., Tit. 10 § 1101(a) (Supp. 1976). In 1972, 18 also was established as the age of majority for males and females in civil matters, Okla. Stat., Tit. 15 § 13 (1972 and Supp. 1976), except that §§ 241 and 245 of the 3.2% beer statute were simultaneously codified to create an exception to the gender-free rule.

Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." 404 U.S., at 75. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed*, the objectives of "reducing the workload on probate courts," id., at 76, and "avoiding intrafamily controversy," id., at 77, were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. See, e.g., Stanley v. Illinois, 405 U.S. 645, 656 (1972); Frontiero v. Richardson, 411 U.S. 677, 690 (1973); cf. Schlesinger v. Ballard, 419 U.S. 498, 506-507 (1975). And only two Terms ago, *Stanton v. Stanton*, 421 U.S. 7 (1975), expressly stating that *Reed v. Reed* was "controlling," 421 U.S., at 13, held that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds. 421 U.S., at 14-15.

*Reed v. Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations, Schlesinger v. Ballard, supra, at 508, concerning the financial position of servicewomen, Frontiero v. Richardson, supra, at 689 n.23, and working
women, Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975), could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. Stanton v. Stanton, supra; Taylor v. Louisiana, 419 U.S. 522, 535 n.17 (1975). In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.

In this case, too, "Reed, we feel, is controlling. . . ," Stanton v. Stanton, supra, at 13. We turn then to the question whether, under Reed, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

We accept for purposes of discussion the District Court's identification of the objective underlying §§ 241 and 245 as the enhancement of traffic safety. [FN 7: That this was the true purpose is not at all self-evident. The purpose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments. The District Court acknowledged the nonexistence of materials necessary "to reveal what the actual purpose of the legislature was," but concluded that "we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally." 399 F. Supp., at 1311 n.6.] Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18-20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for that same age period. Similarly, youths aged 17-21 were found to be overrepresented among those killed or injured in traffic accidents, with males again numerically exceeding females in this regard. Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts. Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for "driving under the influence." Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma's experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol. Conceding that "the case is not free from doubt," 399 F. Supp., at 1314, the District Court nonetheless concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification." Id., at 1307.

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical
surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate – driving while under the influence of alcohol – the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious methodological problems, the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating." Okla. Stat., Tit. 37 § 163.1 (1958).

There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective.

Justice POWELL, concurring.

I join the opinion of the Court as I am in general agreement with it. I do have reservations as to some of the discussion concerning the appropriate standard for equal protection analysis and the relevance of the statistical evidence. Accordingly, I add this concurring statement.

With respect to the equal protection standard, I agree that Reed v. Reed, 404 U.S. 71 (1971), is the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court's language may imply. Reed and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present.* [FN*: [T]he Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute
for more critical analysis, that approach – with its narrowly limited "upper-tier" – now has substantial precedential support. As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. For thoughtful discussions of equal protection analysis, see, e.g., Gunther, The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945 (1975).

I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a "fair and substantial relation" to this objective. [Reed, 404 U.S., at 76, quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

It seems to me that the statistics offered by appellees and relied upon by the District Court do tend generally to support the view that young men drive more, possibly are inclined to drink more, and – for various reasons – are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

Justice STEVENS, concurring.

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms.

In this case, the classification is not as obnoxious as some the Court has condemned, nor as inoffensive as some the Court has accepted. It is objectionable because it is based on an accident of birth, because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket, and because, to the extent it reflects any physical difference between males and females, it is actually perverse. [FN 4: Because males are generally heavier than
females, they have a greater capacity to consume alcohol without impairing their driving ability than do females.] The question then is whether the traffic safety justification put forward by the State is sufficient to make an otherwise offensive classification acceptable.

The classification is not totally irrational. For the evidence does indicate that there are more males than females in this age bracket who drive and also more who drink. Nevertheless, there are several reasons why I regard the justification as unacceptable. It is difficult to believe that the statute was actually intended to cope with the problem of traffic safety, since it has only a minimal effect on access to a not very intoxicating beverage and does not prohibit its consumption. [FN 6: It forbids the sale of 3.2% beer to 18-20-year-old men without forbidding possession, or preventing them from obtaining it from other sources, such as friends who are either older or female. Thus, the statute only slightly impedes access to 3.2% beer.] Moreover, the empirical data submitted by the State accentuate the unfairness of treating all 18-20-year-old males as inferior to their female counterparts. The legislation imposes a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcoholic beverages. It is unlikely that this law will have a significant deterrent effect either on that 2% or on the law-abiding 98%. But even assuming some such slight benefit, it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.

Justice STEWART, concurring in the judgment.

The disparity created by these Oklahoma statutes amounts to total irrationality. For the statistics upon which the State now relies, whatever their other shortcomings, wholly fail to prove or even suggest that 3.2% beer is somehow more deleterious when it comes into the hands of a male aged 18-20 than of a female of like age. The disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination. See Reed v. Reed, 404 U.S. 71.

Chief Justice BURGER, dissenting.

I am in general agreement with Justice Rehnquist's dissent, but even at the risk of compounding the obvious confusion created by those voting to reverse the District Court, I will add a few words.

At the outset I cannot agree that appellant Whitener has standing arising from her status as a saloonkeeper to assert the constitutional rights of her customers. In this Court "a litigant may only assert his own constitutional rights or immunities." United States v. Raines, 362 U.S. 17, 22 (1960). There are a few, but strictly limited exceptions to that rule; despite the most creative efforts, this case fits within none of them.

On the merits, we have only recently recognized that our duty is not "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). Thus, even interests of such importance in our society as public education and housing do not qualify as "fundamental rights" for equal protection purposes because they have no textually independent constitutional status. See id., at 29-39 (education);
Lindsey v. Normet, 405 U.S. 56 (1972) (housing). Though today's decision does not go so far as to make gender-based classifications "suspect," it makes gender a disfavored classification. Without an independent constitutional basis supporting the right asserted or disfavoring the classification adopted, I can justify no substantive constitutional protection other than the normal [minimum rationality review] protection afforded by the Equal Protection Clause.

The means employed by the Oklahoma Legislature to achieve the objectives sought may not be agreeable to some judges, but since eight Members of the Court think the means not irrational [Ed.: only Justice Stewart concluded the statute was “totally irrational”], I see no basis for striking down the statute as violative of the Constitution simply because we find it unwise, unneeded, or possibly even a bit foolish.

Justice REHNQUIST, dissenting.

The Court's disposition of this case is objectionable on two grounds. First is its conclusion that men challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court's enunciation of this standard, without citation to any source, as being that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973), from their view that sex is a "suspect" classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the "rational basis" equal protection analysis expounded in cases such as McGowan v. Maryland, 366 U.S. 420 (1961), and Williamson v. Lee Optical Co., 348 U.S. 483 (1955) [Ed.: i.e., minimum rationality review], and I believe that it is constitutional under that analysis.

Subsequent to Frontiero, the Court has declined to hold that sex is a suspect class, Stanton v. Stanton, supra, at 13, and no such holding is imported by the Court's resolution of this case. However, the Court's application here of an elevated or "intermediate" level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard.

It is true that a number of our opinions contain broadly phrased dicta implying that the same test should be applied to all classifications based on sex, whether affecting females or males. E.g., Frontiero v. Richardson, supra, at 688; Reed v. Reed, 404 U.S. 71, 76 (1971). However, before today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution. There being no such interest here, and there being no plausible argument that this is a discrimination against females, the Court's reliance on our previous sex-discrimination cases is ill-founded. It treats gender classification as a talisman which – without regard to the rights involved or the persons affected – calls into effect a heavier burden of judicial review.
The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized – the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved – so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

The applicable rational-basis test is one which "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S., at 425-426 (citations omitted).

Our decisions indicate that application of the Equal Protection Clause in a context not justifying an elevated level of scrutiny does not demand "mathematical nicety" or the elimination of all inequality. Those cases recognize that the practical problems of government may require rough accommodations of interests, and hold that such accommodations should be respected unless no reasonable basis can be found to support them. Dandridge v. Williams, 397 U.S., at 485. Whether the same ends might have been better or more precisely served by a different approach is no part of the judicial inquiry under the traditional minimum rationality approach. Richardson v. Belcher, 404 U.S., at 84.

The rationality of a statutory classification for equal protection purposes does not depend upon the statistical "fit" between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment. Therefore the present equal protection challenge to this gender-based discrimination poses only the question whether the incidence of drunk driving among young men is sufficiently greater than among young women to justify differential treatment. Notwithstanding the Court's critique of the statistical evidence, that evidence suggests clear differences between the drinking and driving habits of young men and women. [Ed.: Thus, the legislature is dealing with the greater part of the problem first, since 10 times as many boys are arrested for drunk driving as girls.] Those differences are grounds enough for the State reasonably to conclude that young males pose by far the greater drunk-driving hazard, both in terms of sheer numbers and in terms of hazard on a per-driver basis. The gender-based difference in treatment in this case is therefore not irrational.
Justice Rehnquist is accurate in his dissent in *Craig v. Boren* when he states that Justice Brennan, speaking for the Court, abandoned his quest for strict scrutiny in gender discrimination cases in favor of what has come to be known as “intermediate review.” Borrowing the “substantial relationship” language from Reed’s cite to *Royster Guano*, Brennan said that gender classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Applying that standard, he found that barring only males aged 18-20 from buying low-alcohol 3.2% beer was not substantially related to the important goal of traffic safety. Although arrest statistics showed men in this age group were 10 times more likely to be arrested for drunk driving than women (.18% for females; 2% for males), Justice Brennan noted that only 2% of males had been arrested for drunk driving, and that “Oklahoma’s statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions),” making the relationship not substantial, but “unduly tenuous.”

Under standard doctrine today, the Oklahoma statute probably would also be viewed as violating the third prong of intermediate review as being “substantially more burdensome than necessary,” since it banned all 18-20-year-old males from buying 3.2% beer, even though statistics showed that only “2% of males in that age group were arrested for that offense.” Even if that 2% arrest rate suggests perhaps 10% of males were driving drunk, but just not stopped and arrested, the law might still be viewed as substantially too burdensome, although that would be a closer call. Banning all 18-20 years olds from buying, or drinking, beer to deal with teenage drunk driving would involve age discrimination, which triggers only minimum rationality review, as addressed at § 23.4.1.

By 1980, the *Craig v. Boren* test had more adherents. Chief Justice Burger, and Justices Stewart and Powell, joined with Justices White, Brennan, Marshall, and Blackmun in *Wengler v. Druggists Mutual Insurance Co.* to hold unconstitutional under *Craig v. Boren’s* intermediate scrutiny standard a workers’ compensation law that required widowers, but not widows, to prove actual dependency in order to recover death benefits for work-related accidents. The Court said that the state must choose whether to extend the dependency presumption to widowers or eliminate it for widows. Justice Stevens concurred in the Court’s judgment. It appeared that only Justice Rehnquist still clung to rational basis scrutiny. By this time, the Court had decided that even though the Equal Rights Amendment was not going to pass, with only 35 states ratifying the Amendment, not the required 3/4 majority of 38, the Court would be vigorous in scrutinizing gender discrimination, even though not under strict scrutiny review which would have been used had the Amendment passed.

As Justice Stevens did in *Craig v. Boren*, Justices have sometimes considered whether they should scrap the existing levels of review, and adopt “one level” of review, but then apply the test according to a “sliding scale” approach. As typically defined, a sliding scale approach “considers such

13 446 U.S. 142 (1980); id. at 154-55 (Stevens, J., concurring in the judgment); id. at 153-54 (Rehnquist, J., dissenting).

factors as the constitutional and social importance of the interests adversely affected and the invidiousness of the basis on which the classification was drawn. . . . Those who favor a sliding scale believe that it would lead to more candid discussion of the competing interests and therefore provide overall better decision making.15 On the other hand, the sliding scale approach has been criticized as not providing the judge with sufficient objective standards to minimize judicially activist decisionmaking.16 Further, a sliding scale approach may well provide lower courts with too much discretion in applying the sliding scale standard. This is particularly true given the growth in the dockets of the lower federal courts, which makes it “essentially impossible for the [Supreme] Court to engage in meaningful ‘error correction.’”17

Sometimes it is not easy to determine whether gender discrimination exists in a statute. For example, in 1974, in Geduldig v. Aiello,18 the Court considered whether classifications based on pregnancy were gender discrimination. A California state employee disability insurance program excluded from coverage all disabilities resulting from normal pregnancy. The Court did not find an equal protection violation, explaining that there was no risk from which men are protected and women are not and no risk from which women are protected and men are not. In 1976, in General Electric Co. v. Gilbert,19 the Court, reaffirming Geduldig, held that Title VII of the Civil Rights Act of 1964, which forbids sex discrimination in employment, did not require disabilities because of pregnancy be included in company disability plans. The Court held that there was no gender discrimination because the classification was pregnant women versus men and non-pregnant women.

In 1978, Congress changed for the future the results in Geduldig and General Electric by passing the Pregnancy Discrimination Act (PDA), which provides that women affected by pregnancy shall be treated the same for all employment-related purposes as other persons not so affected but similar


16 See, e.g., District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008) (in criticizing Justice Breyer for an interest-balancing approach to the Second Amendment right to bear arms, Justice Scalia noted, “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. . . . A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”).


in their ability or inability to work. Applying this law, in *Newport News, Shipbuilding and Dry Dock Co. v. EEOC*,
the Court invalidated a health plan that provided less benefits for pregnancy-related conditions to spouses of male employees than it gave to female employees.

On a different issue concerning the fact that women, as a class, live longer than men, the Court held in *City of Los Angeles v. Manhart* that Title VII bars employers from requiring women to make higher payments in a retirement program. Justice Stevens explained for the Court that requiring higher payments because of membership in the class of women discriminates against every woman. Stevens added that even a true generalization about a class is an insufficient reason to disqualify an individual to whom the generalization does not apply.

When a statue is neutral on its face, it still can be tested under intermediate review if the statute was passed based on a discriminatory intent. The test for discriminatory intent here is the same as for racial discriminatory intent, addressed at § 20.4. In 1979, the Court held in *Personnel Administrator of Massachusetts v. Feeney* that a state's job preference for veterans in civil service employment was not intentional discrimination against women, even though less than 2% of veterans were women, but rather was adopted to aid veterans returning to civilian employment. The Court noted that many non-veteran men were also disadvantaged by the law, and that the law was not passed "because of," but merely "in spite of," its adverse effects upon women. Justice Marshall, dissenting, joined by Justice Brennan, said a *prima facie* case was established by the foreseeable impact of the law, plus exempting all job requisitions “especially calling for women,” thus creating a gender-based civil service with women in low-grade clerical or secretarial jobs and men as supervisors.

As indicated by *Feeney*, mere discriminatory effects do not establish a case of gender discrimination, just as mere discriminatory effects do not establish race discrimination. It has been noted that women often suffer disproportionally in the aftermath of natural disasters, both in terms of higher risks of sexual assaults during the immediate aftermath, and in terms of often-greater child care responsibilities make securing housing or new employment more difficult where existing homes and jobs were destroyed by the disaster. Women are also often the targets for special abuse in circumstances of armed conflict. In the absence of a showing of discriminatory intent, none of these burdens represent violations of gender discrimination under the Equal Protection Clause.


21 435 U.S. 702, 707-14 (1978). A similar result was reached in *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1074-75 (1983), where there were equal pay-ins but unequal pay-outs.

22 442 U.S. 256, 276-80 (1979); *id.* at 281-86 (Marshall, J., joined by Brennan, J., dissenting).


24 *See, e.g.*, Stephanie N. Sackellaes, *From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict*, 20 Wisconsin Women’s L.J. 137 (2005).
Finally, tricky issues of gender identification can be presented to courts when dealing with transgendered individuals, or those individuals who have undergone sex change operations. Some states base gender identity solely on the individual’s initial chromosomes (XX for women, XY for men), while other states use flexible categorization that permit gender identity to change after a sex change operation. Following a successful sex change operation, an individual would thus be defined as a man in some states, but a woman in another. Issues would then be presented, for example, with whom such an individual could marry, and would any marriage in one state be given Full Faith and Credit in another state with a different definition of gender identity.

§ 22.3 Post-1980 Cases of Discrimination Against Women

By 1980, the Court had moved in the direction of requiring under intermediate review that the legislation must (1) advance important or substantial government ends and (2) be substantially related to advancing these ends. The government could use “plausible” as well as “actual” government purposes to justify its action, as done in FN 7 in Craig v. Boren, excerpted at § 22.2. The additional prong of (3) not being substantially more burdensome than necessary developed most clearly in the First Amendment context of content-neutral regulations of speech, like regulations based not on the content of the speech, but on the time, place, or manner of the speech. Adopting an intermediate review approach, the Court indicated in 1989 in Ward v. Rock Against Racism, excerpted at § 29.3, that a “regulation of time, place, or manner of protected speech must be narrowly tailored” to serve the government interests, but it “need not be the least-restrictive or least-intrusive means of doing so,” which would be required at strict scrutiny. Instead, such a regulation of speech cannot “burden substantially more speech than necessary” to further the interest, nor can it place a substantial burden on speech by failing to leave “open ample alternative channels of communication.” Such a third prong to intermediate review is logically necessary, as indicated by the discussion of benefits and burdens at § 19.1 nn.40-43, because the “substantially related to advancing important government ends” language applies both to the statute’s “underinclusiveness,” to which prong 2 responds by asking whether benefits are substantially achieved by the statute, and “overinclusiveness,” to which prong 3 responds by asking whom the statute unnecessarily burdens.

In 1994, in J.E.B. v. Alabama ex rel. T.B., the Court held that the Equal Protection Clause forbids peremptory challenges on the basis of gender, in addition to race, as had previously been held in Batson v. Kentucky, discussed at § 20.4 nn.71-76. Justice Blackmun wrote that the state has an

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27 511 U.S. 127, 140-44 (1994), citing Batson, 476 U.S. 79 (1986); id. at 151-54 (Kennedy, J., concurring in the judgment). Justice O’Connor, concurring, would have limited the Court’s holding to the government’s use of peremptory strikes on state action grounds, consistent with her dissent in Edmonson v. Leesville Concrete Co., excerpted at § 15.3. Id. at 146-51 (O’Connor, J., concurring).
important interest is in achieving a fair and impartial trial. However, the record indicated virtually no support for the conclusion that gender alone is an accurate predictor of a juror's attitudes. Instead, that generalization seemed to be the product of a stereotype. Chief Justice Rehnquist, dissenting, thought that intermediate scrutiny had been satisfied because it is not merely stereotyping to say that differences in biology and experience may produce a difference in outlook in the jury room. Justice Scalia also dissented, joined by Chief Justice Rehnquist and Justice Thomas. Justice Scalia said that since all groups are subject to peremptory challenge and will be made the object of it, depending on the case, it is hard to see that any group is denied equal protection. In this paternity action, the state used 9 of its 10 peremptory strikes to remove male jurors; the defendant used all but one of his strikes to remove female jurors. This was not an example of sex-based animus, but merely a desire to get a jury favorably disposed to the advocate's case.28

Despite these developments, some cases in the 1980s and 1990s struggled with the precise phrasing of the intermediate review approach, as indicated in United States v. Virginia below, and with whether heightened scrutiny should be applied to discrimination against men, addressed at § 22.4. Today, these issues seemed to have been resolved in favor of applying the "substantially related to advancing important interests" test, as stated above, to any gender discrimination, whether against women or men, using plausible as well as actual government purposes to justify the government action. The government bears the burden of justifying its action at intermediate review, just as it bears the burden of proof at strict scrutiny. Fewer cases have been litigated since 2000, since fewer statutes today, federal or state, discriminate on gender grounds. But see Hayden v. Greensburg Community Sch. Corp., 743 F.3d 569 (7th Cir. 2014) (school district policy where boys, but not girls, need to keep hair short in order to play scholastic basketball unconstitutional gender discrimination).

United States v. Virginia
518 U.S. 515 (1996)

Justice GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once

28 511 U.S. at 154 (Rehnquist, C.J., dissenting); id. at 156 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

[After this litigation began], Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission – to produce "citizen-soldiers" – the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. See 852 F. Supp. 471, 476-477 (WD Va. 1994).

The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI – extraordinary opportunities for military training and civilian leadership development – deny to women "capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, id., at 1413 – as Virginia's sole single-sex public institution of higher education – offends the Constitution's equal protection principle, what is the remedial requirement?

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. Reed v. Reed, 404 U.S. 71, 73 (holding unconstitutional Idaho Code prescription that, among "several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females"). Since Reed, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455, 462-463 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).
Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See J.E.B., 511 U.S. at 152 (Kennedy, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See Mississippi Univ. for Women, 458 U.S. at 724. The State must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Ibid. (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)). The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 223-224 (1977) (Stevens, J., concurring in judgment).

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See Loving v. Virginia, 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." Ballard v. United States, 329 U.S. 187, 193 (1946).

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam), to "promote equal employment opportunity," see California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, see Goesaert, 335 U.S. at 467, to create or perpetuate the legal, social, and economic inferiority of women.

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." 976 F.2d, at 892. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of women. First, the Commonwealth contends, "single-sex education provides important educational benefits," Brief for Cross-Petitioners 20, and the option of single-sex education contributes to diversity in educational approaches, id., at 25. Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. Id., at 3336 (internal quotation marks omitted). We consider these two justifications in turn.
Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that “benign” justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. See Wiesenfeld, 420 U.S., at 648, and n.16 (“mere recitation of a benign [or] compensatory purpose” does not block “inquiry into the actual purposes” of government-maintained gender-based classifications); Goldfarb, 430 U.S., at 212-213 (rejecting government-proffered purposes after “inquiry into the actual purposes” (internal quotation marks omitted)).

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" See 976 F.2d, at 899. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See ibid. That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." Ibid. A purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan – a plan to "affor[d] a unique educational benefit only to males." Ibid. However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. See Brief for Cross-Petitioners 34-36. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia." Id., at 34.

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach." 976 F.2d, at 896-897. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross-Respondent 11, 29-30. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F. Supp., at 481. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See ibid. "Some women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F. Supp., at 1414, and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets," id., at 1412. The parties, furthermore, agree that "some women can meet
the physical standards [VMI] now impose[s] on men." 976 F.2d, at 896. In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's raison d'être, "nor VMI's implementing methodology is inherently unsuitable to women." Id., at 899.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." 766 F. Supp., at 1434-1435. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." Id., at 1434. For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." Ibid. "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." Ibid. (internal quotation marks omitted).

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in Reed v. Reed, 404 U.S. 71 (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See [Justice Sandra Day] O'Connor, Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1551 (1991). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." Mississippi Univ. for Women, 458 U.S. at 725; see J.E.B., 511 U.S. at 139, n.11 (equal protection principles, as applied to gender classifications, mean state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals "imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril." 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps. Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" Mississippi Univ. for Women, 458 U.S. at 731, that must be the solid base for any gender-defined classification.

In the second phase of the litigation, Virginia presented its remedial plan – maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-
gender education, and "achieving the results of an adversative method in a military environment." See 44 F.3d, at 1236, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afforded to both genders benefits comparable in substance, [if] not in form and detail," id., at 1240, the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, id., at 1240-1241. The United States challenges this "remedial" ruling as pervasively misguided.

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." See Milliken v. Bradley, 433 U.S. 267, 280 (1977) (internal quotation marks omitted).

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. [FN21: R. Morris, The Forging of the Union, 1781-89, p. 193 (1987)]. VMI's story continued as our comprehension of “We the People” expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the “more perfect Union.”

Justice THOMAS took no part in the consideration or decision of this case. [Ed.: Justice Thomas’ son was in attendance at VMI at the time of this case.]

Chief Justice REHNQUIST, concurring in the judgment.

The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis and so I write separately.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. See, e.g., Feeney, supra, at 273 ("[T]hese precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, "firmly established," Hogan, [458 U.S], at 723, standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives." Feeney, [442 U.S.], at 273.
The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." Post, at 595. The private women's colleges are treated by the Commonwealth exactly as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is pedagogically beneficial for some students, see 766 F. Supp., at 1414, and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

Justice SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed minded they were – as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be
persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy – so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States – the old one – takes no sides in this educational debate, I dissent.

I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights," Clark v. Jeter, 486 U.S. 456, 461 (1988) (citation omitted). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion of Scalia, J.); but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex. See, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994); Mills v. Habluetzel, 456 U.S. 91, 98-99 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976).

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede – and indeed ought to be crafted so as to reflect – those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting). The same applies, mutatis mutandis, to a practice asserted to be in

Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in Califano v. Webster, 430 U.S. 313 (1977) (per curiam), we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefitted had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women on the average received lower retirement benefits than men." Id., at 318, and n. 5 (emphasis added). The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. In Rostker v. Goldberg, 453 U.S. 57 (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." Id., at 81. In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 579 (1990), overruled on other grounds, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying objective.

The Court argues that VMI would not have to change very much if it were to admit women. The principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to discuss, that concludes the inquiry. There should be no debate in the federal judiciary over "how much" VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "The evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests." 766 F. Supp., at 1411. Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training
program, which would reduce "the intensity and aggressiveness of the current program"; and various modifications in other respects of the adversative training program that permeates student life. See id., at 1412-1413, 1435-1443. As the Court of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach – would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." 976 F.2d, at 896-897.

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "the notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved." Ante, at 542 (footnote omitted). The point about "downgrading VMI's stature" is a straw man; no one has made any such claim. The point about "destroying the adversative system" is simply false; the District Court not only stated that "evidence supports this theory," but specifically concluded that while "without a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." 766 F. Supp., at 1413, and n.8, 1440. And the point about "destroying the school," depending upon what that ambiguous phrase is intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of women, 766 F. Supp., at 1412, and "would eventually find it necessary to drop the adversative system altogether," id., at 1413.

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an "exceedingly persuasive justification" for the classification. Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard has been met will not be determined on the basis of the record evidence – indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to "support [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." 766 F. Supp., at 1415 (emphasis added).
Following the Court’s decision in *United States v. Virginia*, VMI did admit women to its program. As of 2014, roughly 10% of its student/cadet population is female. It has continued its “adversative method” of instruction, and is still a thriving university today.\(^{29}\)

In *United States v. Virginia*, Justice Rehnquist concurred in the result but said that the Court's use of the phrase "exceedingly persuasive justification," originally used as an observation on the difficulty of meeting the intermediate scrutiny test, seemed here to become part of the test. He disagreed with such use, and stated that the Court should stick with the standard “substantially related to important government interests” test. The Court’s next major gender discrimination case in 2001, *Nguyen v. INS*,\(^{30}\) which also involved illegitimacy, and is excerpted at § 23.3, followed this advice and did not repeat the “exceedingly persuasive justification” language except as an adjunct to the “substantial relationship” test, a fact noted and criticized by Justices O’Connor, Souter, Ginsburg, and Breyer in dissent.

Justice Rehnquist did not challenge in his opinion Justice Ginsburg’s conclusion that under the intermediate standard the proffered purpose for a challenged law must be the “actual purpose.” The more typical requirement at intermediate scrutiny, however, is that the interest be a “plausible” purpose.\(^{31}\) This approach recognizes that “inquiries into congressional motives or purposes are a hazardous matter,”\(^{32}\) while also recognizing that the Court should not permit “post hoc rationalizations” to justify a statute at intermediate scrutiny.\(^{33}\) The two cases cited by Justice Ginsburg in *United States v. Virginia* to support using a strict scrutiny “actual purpose” analysis do not clearly support that position. In the first case, *Weinberger v. Wiesenfeld*,\(^{34}\) while the Court did conduct an inquiry into the actual purposes underlying the statutory scheme, the Court indicated that this inquiry was directed to rejecting a purported purpose that “could not have been a goal of the legislation.” Thus, in context, the focus of the analysis was on whether the asserted purpose was plausible, that purpose being rejected once its implausibility was demonstrated. In the second case,

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\(^{29}\) *See generally* Virginia Military Institute website (www.vmi.edu).


\(^{31}\) *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 470 (1981), excerpted at § 22.4; Craig v. Boren, 429 U.S. 190, 199-200 n.7 (1976), excerpted at § 22.2.

\(^{32}\) *Michael M.*, 450 U.S. at 469.

\(^{33}\) *Virginia*, 518 U.S. at 535-36.

\(^{34}\) 420 U.S. 636, 648 & n.16 (1975).
Califano v. Goldfarb, Justice Ginsburg cited the four-Judge plurality opinion which did seem to adopt an actual purpose inquiry. Justice Stevens’ concurrence, however, which provided the fifth vote in that case, phrased the test as whether faced with an interest “put forward by the Government as its justification” the Court “might presume that Congress has such an interest in mind.” In United States v. Virginia, this doctrinal difference did not matter, since, as Justice Ginsburg noted, there was “no persuasive evidence” that Virginia had educational diversity in mind, and thus that purpose was neither “actual” nor “plausible,” but the kind of “post-hoc rationalization” that can only be used at minimum rationality review. The Court’s 2001 intermediate scrutiny case, Nguyen v. INS, excerpted at § 23.3, reflected the traditional doctrine, as the dissent of Justices O’Connor, Souter, Ginsburg, and Breyer criticized the majority for not requiring “actual purposes” in the case.

Justice Scalia has been proven right that there are no public single-sex colleges or universities today. There has not been similar negative consequences for private single-sex colleges. Title IX, 20 U.S.C. 1681, et. seq., originally adopted in 1972, states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Congress made it clear in the Civil Rights Restoration Act of 1987 that if any program or activity at an educational institution receives federal funds, then the entire institution must comply with Title IX. Thus, a research grant to one department at a university will make the entire university responsible for complying with Title IX and other federal civil rights laws in all of its programs and activities. Despite this fact, students attending private single-sex colleges still receive federally guaranteed student loans. A similar case is Zelman v. Simmon-Harris, excerpted at § 41.4. In Zelman, a school voucher program was upheld against an Establishment Clause challenge where the governmental provided voucher assistance for educational expenses to a broad class of citizens, who made independent judgments whether to use the voucher to fund educational expenses at religious or secular private schools. Similar independent judgments by individuals to attend private single-sex colleges using federal financial aid are permissible under Title IX and the Equal Protection Clause.

Evidence of educational benefits of single-sex programs at primary and secondary school levels give such public school single-sex programs better chance of constitutional success. Many such
programs currently exists, particularly for girls in single-sex math or science classes, or boys who have had disciplinary issues in coeducational classes being transferred into single-sex classes headed by a male teacher. Under Department of Education regulations adopted in 2006 implementing Title IX, 34 C.F.R. § 106.34, in addition to traditional single-sex instruction – contact sports in physical education classes, ability grouping in physical education classes, human sexuality classes, and choruses – single-sex classes at schools receiving federal financial assistance are permitted as along as “(i) Each single-sex class or extracurricular activity is based on the recipient’s [school] important objective (A) To improve educational achievement of its students, through an established policy to provide diverse educational opportunities, provided that the single-sex nature of the class is substantially related to achieving that objective, or (B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class is substantially related to achieving that objective; (ii) The recipient implements its objective an even-handed manner; (iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and (iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.”

One author has observed, “A preoccupation with single-sex education is arguably a diversion from dealing with schools as a whole. . . . Well-funded and carefully monitored single-sex opportunities may be valuable for the small number of children who receive them. . . . [However, we] need to focus on both the equality and quality in education for all children, all girls and all boys. . . . So we had better make sure that that education is as excellent and as bias-free as possible.”

Under state public accommodation laws, or as a matter of constitutional gender discrimination law, there is an issue whether special pricing policies, such as waiving a “cover charge” at bars on some nights for women, violates either public accommodations law or the Constitution. Similar gender discrimination issues can arise in the context of different “grooming policies” for male and female workers, or aspects of “sexual stereotyping” more generally, either under Title VII of the 1964 Civil Rights Act or, for state action, under the Constitution. As a matter of constitutional law, the better approach would seem to be that a narrowly drawn policy substantially related to a non-discriminatory economic interest in the business maximizing overall profits should be viewed as constitutional under intermediate scrutiny review, but sexual stereotyping should not.

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40 See generally Jessica E. Rank, *Is Ladies’ Night Really Sex Discrimination?: Public Accommodation Law, De Minimis Exceptions, and Stigmatic Injury*, 36 Seton Hall L. Rev. 223 (2005) (varying court opinions); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (sexual stereotyping used to deny female partnership candidate admission as partner in accounting firm violates Title VII); Jespersen v. Harrah’s Operating Co., 392 F.3d 1076 (9th Cir. 2004) (differential grooming policies for men and women employees of casino does not violate Title VII); Hayden v. Greensburg Community Sch. Corp., 743 F.3d 569 (7th Cir. 2014) (school district policy under which boys, but not girls, need to keep hair short in order to play basketball invalid gender discrimination).
§ 22.4  Post-1980 Cases of Discrimination Against Men

Michael M. v. Superior Court
450 U.S. 464  (1981)

Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice STEWART, and Justice POWELL joined.

The question presented in this case is whether California's “statutory rape” law, § 261.5 of the Cal. Penal Code Ann. (West Supp.1981), violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.” The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17 1/2 -year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence, adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16 1/2 -year-old female, and her sister as they waited at a bus stop. Petitioner and Sharon, who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that § 261.5 unlawfully discriminated on the basis of gender. The trial court and the California Court of Appeal denied petitioner's request for relief and petitioner sought review in the Supreme Court of California.

The Supreme Court held that “section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section.” 601 P.2d 572, 574.

As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications. The issues posed by such challenges range from issues of standing, see Orr v. Orr, 440 U.S. 268, to the appropriate standard of judicial review for the substantive classification. Our cases have held . . . that the traditional minimum rationality test takes on a somewhat “sharper focus” when gender-based classifications are challenged. See Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring). In Reed v. Reed, 404 U.S. 71 (1971), for example, the Court stated that a gender-based classification will be upheld if it bears a “fair and substantial relationship” to legitimate state ends, while in Craig v. Boren, supra, 429 U.S. at 197, the Court restated the test to require the classification to bear a “substantial relationship” to “important governmental objectives.”

Applying those principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct. Precisely why the legislature desired that result is of course somewhat less clear. This Court has long recognized that “[i]nquiries into congressional motives or purposes are
a hazardous matter,” United States v. O'Brien, 391 U.S. 367, 383-384 (1968); Palmer v. Thompson, 403 U.S. 217, 224 (1971), and the search for the “actual” or “primary” purpose of a statute is likely to be elusive. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); McGinnis v. Royster, 410 U.S. 263, 276-277 (1973). Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of “chastity,” and still others about promoting various religious and moral attitudes towards premarital sex. [FN 2: The statute was enacted as part of California's first penal code in 1850, 1850 Cal. Stats., ch. 99, § 47, p. 234, and recodified and amended in 1970.]

The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. Reitman v. Mulkey, 387 U.S. 369, 373-374 (1967). And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, if it “could not have been a goal of the legislation,” Weinberger v. Wiesenfeld, supra, 420 U.S. at 648, n.16, this is not such a case.

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the “purposes” of the statute, but also that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State. Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion. And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female.

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly “equalize” the deterrents on the sexes.

We are unable to accept petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male. It is argued that this statute is not necessary to deter teenage pregnancy because a gender-neutral statute, where both male and female would be subject to prosecution, would serve that goal equally well. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. Kahn v. Shevin, 416 U.S., at 356 n.10.
In any event, we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. The State persuasively contends that a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.

We similarly reject petitioner's argument that § 261.5 is impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant. Quite apart from the fact that the statute could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, see Rundlett v. Oliver, 607 F.2d 495 (CA1 1979), it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls.

There remains only petitioner's contention that the statute is unconstitutional as it is applied to him because he, like Sharon, was under 18 at the time of sexual intercourse. Petitioner argues that the statute is flawed because it presumes that as between two persons under 18, the male is the culpable aggressor. We find petitioner's contentions unpersuasive. Contrary to his assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented.

In upholding the California statute we also recognize that this is not a case where a statute is being challenged on the grounds that it “invidiously discriminates” against females. To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made “solely for . . . administrative convenience,” as in Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (emphasis omitted), or rests on “the baggage of sexual stereotypes” as in Orr v. Orr, 440 U.S., at 283.

Justice STEWART, concurring.

Section 261.5 is thus but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity. To be sure, § 261.5 creates an additional measure of punishment for males who engage in sexual intercourse with females between the ages of 14 and 17. The question then is whether the Constitution prohibits a state legislature from imposing this additional sanction on a gender-specific basis.

[It] is readily apparent that § 261.5 does not violate the Equal Protection Clause. Young women and men are not similarly situated with respect to the problems and risk associated with intercourse and pregnancy, and the statute is realistically related to the legitimate state purpose of reducing those problems and risks.
Justice BLACKMUN, concurring in the judgment.

It is gratifying that the plurality recognizes that “[a]t the risk of stating the obvious, teenage pregnancies . . . have increased dramatically over the last two decades” and “have significant social, medical, and economic consequences for both the mother and her child, and the State.”

I note, also, that § 261.5 of the California Penal Code is just one of several California statutes intended to protect the juvenile. Justice Stewart, in his concurring opinion, appropriately observes that § 261.5 is “but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity.”

Justice BRENNAN, with whom Justices WHITE and MARSHALL join, dissenting.

It is disturbing to find the Court so splintered on a case that presents such a straightforward issue: Whether the admittedly gender-based classification in Cal. Penal Code Ann. § 261.5 (West Supp.1981) bears a sufficient relationship to the State's asserted goal of preventing teenage pregnancies to survive the “mid-level” constitutional scrutiny mandated by *Craig v. Boren*, 429 U.S. 190 (1976). Applying the analytical framework provided by our precedents, I am convinced that there is only one proper resolution of this issue: the classification must be declared unconstitutional. I fear that the plurality opinion and Justices Stewart and Blackmun reach the opposite result by placing too much emphasis on the desirability of achieving the State's asserted statutory goal – prevention of teenage pregnancy – and not enough emphasis on the fundamental question of whether the sex-based discrimination in the California statute is substantially related to the achievement of that goal.

The State of California vigorously asserts that the “important governmental objective” to be served by § 261.5 is the prevention of teenage pregnancy. It claims that its statute furthers this goal by deterring sexual activity by males – the class of persons it considers more responsible for causing those pregnancies. But even assuming that prevention of teenage pregnancy is an important governmental objective and that it is in fact an objective of § 261.5, California still has the burden of proving that there are fewer teenage pregnancies under its gender-based statutory rape law than there would be if the law were gender neutral.

The plurality assumes that a gender-neutral statute would be less effective than § 261.5 in deterring sexual activity because a gender-neutral statute would create significant enforcement problems. The plurality thus accepts the State's assertion that “a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.”

However, a State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under *Craig v. Boren*. Rather, the State must produce evidence that will persuade the court that its assertion is true. See *Craig v. Boren*, 429 U.S., at 200-204.
The State has not produced such evidence in this case. Moreover, there are at least two serious flaws in the State's assertion that law enforcement problems created by a gender-neutral statutory rape law would make such a statute less effective than a gender-based statute in deterring sexual activity.

First, the experience of other jurisdictions, and California itself, belies the plurality's conclusion that a gender-neutral statutory rape law “may well be incapable of enforcement.” There are now at least 37 States that have enacted gender-neutral statutory rape laws. Although most of these laws protect young persons (of either sex) from the sexual exploitation of older individuals, the laws of Arizona, Florida, and Illinois permit prosecution of both minor females and minor males for engaging in mutual sexual conduct. California has introduced no evidence that those States have been handicapped by the enforcement problems the plurality finds so persuasive. Surely, if those States could provide such evidence, we might expect that California would have introduced it.

The second flaw in the State's assertion is that even assuming that a gender-neutral statute would be more difficult to enforce, the State has still not shown that those enforcement problems would make such a statute less effective than a gender-based statute in deterring minor females from engaging in sexual intercourse. Common sense, however, suggests that a gender-neutral statutory rape law is potentially a greater deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators. Even if fewer persons were prosecuted under the gender-neutral law, as the State suggests, it would still be true that twice as many persons would be subject to arrest. The State's failure to prove that a gender-neutral law would be a less effective deterrent than a gender-based law, like the State's failure to prove that a gender-neutral law would be difficult to enforce, should have led this Court to invalidate § 261.5.

Justice STEVENS, dissenting.

In this case, the fact that a female confronts a greater risk of harm than a male is a reason for applying the prohibition to her – not a reason for granting her a license to use her own judgment on whether or not to assume the risk. Surely, if we examine the problem from the point of view of society's interest in preventing the risk-creating conduct from occurring at all, it is irrational to exempt 50% of the potential violators. See dissent of Justice Brennan. And, if we view the government's interest as that of a parens patriae seeking to protect its subjects from harming themselves, the discrimination is actually perverse. Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter? That is the effect of this statutory classification.

If pregnancy or some other special harm is suffered by one of the two participants in the prohibited act, that special harm no doubt would constitute a legitimate mitigating factor in deciding what, if any, punishment might be appropriate in a given case. But from the standpoint of fashioning a general preventive rule – or, indeed, in determining appropriate punishment when neither party in fact has suffered any special harm – I regard a total exemption for the members of the more endangered class as utterly irrational.
In my opinion, the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other. The risk-creating conduct that this statute is designed to prevent requires the participation of two persons – one male and one female. In many situations it is probably true that one is the aggressor and the other is either an unwilling, or at least a less willing, participant in the joint act. If a statute authorized punishment of only one participant and required the prosecutor to prove that that participant had been the aggressor, I assume that the discrimination would be valid. Although the question is less clear, I also assume, for the purpose of deciding this case, that it would be permissible to punish only the male participant, if one element of the offense were proof that he had been the aggressor, or at least in some respects the more responsible participant in the joint act. The statute at issue in this case, however, requires no such proof. The question raised by this statute is whether the State, consistently with the Federal Constitution, may always punish the male and never the female when they are equally responsible or when the female is the more responsible of the two.

Using standard intermediate scrutiny, the statute in *Michael M.* can be viewed as constitutional, as in Justice Rehnquist’s plurality opinion. Discouraging teenage pregnancy is an “important interest.” The statute is “substantially related” to advancing that interest if one accepts, as California argued in the case, that “a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution.” Finally, the statute is not “substantially more burdensome than necessary,” particularly since a “criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrents on the sexes,” and thus does not create a substantial burden on men.

In their dissent, Justices Brennan, White, and Marshall said the classification could be shown substantially related to its purpose only if California established that a gender neutral law would be less effective as a deterrent. On this point, the dissent is in error. Under strict scrutiny, the government does have to show that they have adopted the “least burdensome effective alternative.” Under strict scrutiny, if a gender neutral law would be an effective alternative, the government would have to adopt that alternative. However, the “least burdensome effective alternative” analysis is not a part of intermediate review. As long as the statute which the state did adopt is “substantially related” to advancing its ends, and not “substantially more burdensome than necessary,” it does not matter at intermediate review whether some other effective statute would be less burdensome, unless that alternative is “substantially less burdensome” than the statute the government adopted.

Despite the victory in *Michael M.*, California amended its statutory rape law in 1993 to make it gender neutral. That is true of all states today. Some states impose punishments only if one party is 18 or older, unless the other party is very young (e.g., under 14). Most state statutes apply even if both parties are under 18. Prosecutorial discretion, of course, may effect how cases involving both parties being under 18 are handled, or whether men or women are prosecuted. Many states, like California, Cal. Penal Code § 261.5, impose greater punishments the greater disparity there is in the parties’ ages – with increased fines or increased possible imprisonment time the greater the age disparity. Such provisions do involve age discrimination, but are constitutional under minimum rationality review as rationally related to protecting younger persons from exploitation.
In 1981, the Court also decided *Rostker v. Goldberg*, where plaintiffs challenged the Military Selective Service Act for authorizing the President to require the registration of males but not females. Justice Rehnquist held that exempting women from draft registration is “substantially related” to the congressional purpose of facilitating the draft of combat troops, where women by law are exempt from combat. It is also true that requiring men aged 18 to register by filing out a registration card is “not substantially more burdensome than necessary.” Justice White, joined by Justice Brennan, dissented, saying that draft registration was also intended to secure people for jobs that could be filled by persons ineligible for combat. Justice Marshall, also joined by Justice Brennan, dissented, saying that the record did not show that completely excluding women from the draft substantially furthered important government objectives. As in *Michael M.*, the dissenters seemed to be applying a “least burdensome effective alternative” approach, which noted that a gender neutral registration system would advance the government’s interest as well. However, since in 1981 a substantial number of military positions would be filled by men, the majority was correct that the Military Selective Service Act was “substantially related” to meeting the military’s personnel requirements. This conclusion would likely still be true today. Given some women today in combat, the statute would not be “directly related” to achieving its end if strict scrutiny applied.

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**Mississippi University for Women v. Hogan**  

Justice O'CONNOR delivered the opinion of the Court.

The facts are not in dispute. In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. 1884 Miss. Gen. Laws, Ch. 30, § 6. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women.

In 1971, MUW established a School of Nursing, initially offering a 2-year associate degree. Three years later, the school instituted a 4-year baccalaureate program in nursing and today also offers a graduate program. The School of Nursing has its own faculty and administrative officers and establishes its own criteria for admission.

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program. Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit. Tr. 26.

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* 453 U.S. 57, 78-83 (1981); *id.* at 83-84 (White, J., joined by Brennan, J., dissenting); *id.* at 106-07 (Marshall, J., joined by Brennan, J., dissenting).
Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Reed v. Reed, 404 U.S. 71, 75 (1971). That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. Orr v. Orr, 440 U.S. 268, 279 (1979). Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979). The burden is met only by showing at least that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.” Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980).

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See Frontiero v. Richardson, 411 U.S. 677, 684-685 (1973) (plurality opinion).

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. Brief for Petitioners 8. As applied to the School of Nursing, we find the State's argument unpersuasive.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification. We considered such a situation in Califano v. Webster, 430 U.S. 313 (1977), which involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, we upheld the statutory scheme, noting that it took into account that women “as such have been unfairly hindered from earning as much as men” and “work[ed] directly to remedy” the resulting economic disparity. Id., at 318.

A similar pattern of discrimination against women influenced our decision in Schlesinger v. Ballard, supra. There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a 9-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW
School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. U.S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred: 1969-1970, Institutional Data 388 (1972). That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide. U.S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred, 1959-1960: Bachelor's and Higher Degrees 135 (1960). As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female. United States Bureau of Census, 1981 Statistical Abstract of the United States 402 (1981).

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.

MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. Deposition of Dr. James Strobel 56-60 and Deposition of Dean Annette K. Barrar 24-26. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, Deposition of Nancy L. Herban 4, that the presence of men in the classroom would not affect the performance of the female nursing students, Tr. 61 and Deposition of Dean Annette K. Barrar 7-8, and that men in coeducational nursing schools do not dominate the classroom. Deposition of Nancy Herban 6. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals [Ed.: MUW's alternative justification for excluding men from the program.].

Chief Justice BURGER, dissenting.

I agree generally with Justice Powell's dissenting opinion. I write separately, however, to emphasize that the Court's holding today is limited to the context of a professional nursing school. Since the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.

Justice BLACKMUN, dissenting.

[Respondent Hogan “wants in” at this particular location in his home city of Columbus. It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to males at Jackson and at Hattiesburg. Mississippi thus has not closed the doors of its educational system to males like Hogan. Assuming that he is qualified – and I have no reason whatsoever to doubt his
qualifications – those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek.

While the Court purports to write narrowly, declaring that it does not decide the same issue with respect to “separate but equal” undergraduate institutions for females and males, or with respect to units of MUW other than its School of Nursing, there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

Justice POWELL, with whom Justice REHNQUIST joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor – indeed, held unconstitutional – is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience. It is undisputed that women enjoy complete equality of opportunity in Mississippi's public system of higher education. Of the State's 8 universities and 16 junior colleges, all except MUW are coeducational. At least two other Mississippi universities would have provided respondent with the nursing curriculum that he wishes to pursue. [FN 1: “[T]wo other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing – the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of Mississippi in Jackson, 147 miles from Columbus . . . .” Brief for Respondent 3. See also Tr. of Oral Arg. 8.] No other male has joined in his complaint. The only groups with any personal acquaintance with MUW to file amicus briefs are female students and alumnae of MUW. And they have emphatically rejected respondent's arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefitted.

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must travel to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of “inconvenience.” This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's hometown. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of “sexual stereotype” reasoning that has no application whatever to the respondent or to the “wrong” of which he complains. At best this is anomalous. And
ultimately the anomaly reveals legal error – that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an additional choice for women.

Coeducation, historically, is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms. At the college level, for instance, until recently some of the most prestigious colleges and universities – including most of the Ivy League – had long histories of single-sex education. As Harvard, Yale, and Princeton remained all-male colleges well into the second half of this century, the “Seven Sister” institutions established a parallel standard of excellence for women's colleges. Of the Seven Sisters, Mount Holyoke opened as a female seminary in 1837 and was chartered as a college in 1888. Vassar was founded in 1865, Smith and Wellesley in 1875, Radcliffe in 1879, Bryn Mawr in 1885, and Barnard in 1889. Mount Holyoke, Smith, and Wellesley recently have made considered decisions to remain essentially single-sex institutions. Barnard retains its independence from Columbia, its traditional coordinate institution. Harvard and Radcliffe maintained separate admissions policies as recently as 1975.

In my view, the Court errs seriously by assuming – without argument or discussion – that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was designed to free women from “archaic and overbroad generalizations . . . .” Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). In no previous case have we applied it to invalidate state efforts to expand women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

The cases cited by the Court therefore do not control the issue now before us. In most of them women were given no opportunity for the same benefit as men. Cases involving male plaintiffs are equally inapplicable. In Craig v. Boren, 429 U.S. 190 (1976), a male under 21 was not permitted to buy beer anywhere in the State, and women were afforded no choice as to whether they would accept the “statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups.” Id., at 209. A similar situation prevailed in Orr v. Orr, 440 U.S. 268, 279 (1979), where men had no opportunity to seek alimony from their divorced wives, and women had no escape from the statute's stereotypical announcement of “the State's preference for an allocation of family responsibilities under which the wife plays a dependent role . . . .”

By applying heightened equal protection analysis to this case, the Court frustrates the liberating spirit of the Equal Protection Clause. It prohibits the States from providing women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the victims of an illegal, stereotyped perception of the role of women in our society.

The Court views this case as presenting a serious equal protection claim of sex discrimination. I do not, and I would sustain Mississippi's right to continue MUW on a rational-basis analysis. But I need not apply this “lowest tier” of scrutiny. I can accept for present purposes the standard applied by the Court: that there is a gender-based distinction that must serve an important governmental objective by means that are substantially related to its achievement. E.g., Wengler v. Druggists Mutual Ins.
Co., 446 U.S. 142, 150 (1980). The record in this case reflects that MUW has a historic position in the State's educational system dating back to 1884. More than 2,000 women presently evidence their preference for MUW by having enrolled there. The choice is one that discriminates invidiously against no one. And the State's purpose in preserving that choice is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason – certainly none of constitutional dimension – to conclude that no substantial state interest is served . . . .

[T]he Court suggests that the MUW is so operated as to “perpetuate the stereotyped view of nursing as an exclusively women's job.” But as the Court itself acknowledges, MUW's School of Nursing was not created until 1971 – about 90 years after the single-sex campus itself was founded. This hardly supports a link between nursing as a woman's profession and MUW's single-sex admission policy. Indeed, MUW's School of Nursing was not instituted until more than a decade after a separate School of Nursing was established at the coeducational University of Mississippi at Jackson. The School of Nursing makes up only one part – a relatively small part – of MUW's diverse modern university campus and curriculum. The other departments on the MUW campus offer a typical range of degrees and a typical range of subjects. There is no indication that women suffer fewer opportunities at other Mississippi state campuses because of MUW's admission policy.

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.

In rejecting intermediate scrutiny, the dissent in Hogan did not consider the admonition in Frontiero v. Richardson, excerpted at § 22.2, that because “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .’ Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).” It is that principle that justifies the similar standard of review applied to gender discrimination against women or men in the law, not merely a concern with “sexual stereotyping.” It is also true the Hogan had a real injury in the case. Had he been a woman he could have attended his “home town” school. Given his personal situation, including any job he held, an alternative school two to three hours drive away may hardly have been a practical alternative. He may not have a constitutional right to attend his “home town” school, but he has a right not to be discriminated against on account of his gender. Like VMI, MUW went co-educational soon after the Court’s decision and is still a thriving institution today.42

42 See Mississippi University for Women website (www.muw.edu). In 2014, roughly 17% of its students were male. U.S. News & World Report Education, Mississippi University for Women.
CHAPTER 23: ADDITIONAL CLASSIFICATIONS AND LEVELS OF REVIEW

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§ 23.1 Introduction to Determining Levels of Scrutiny

As discussed at § 19.1 nn.44-54, in deciding whether to adopt minimum rationality review, intermediate review, or strict scrutiny in any particular case, the Court uses at least nine factors to determine what standard of review to apply. The first of these factors is whether arguments of text, context, and history suggest that the classification is one the framers and ratifiers would have thought deserves heightened scrutiny. As noted at § 19.1 nn.28-30, one clear purpose of the Equal Protection Clause was to deal with cases of race discrimination. As early as 1886, the Court said in *Yick Wo v. Hopkins* ¹ excerpted at § 20.4, that the provisions of the 14th Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality."

Three additional factors were mentioned by the Court in footnote 4 in *United States v. Carolene Products Co.*,² excerpted at §17.3: whether a fundamental right is involved, particularly a right that appears to be within the specific prohibitions of the Constitution, such as those of the first ten Amendments; whether a deficiency exists in the “political process which can ordinarily be expected to bring about repeal of undesirable legislation”; and whether the statute is “directed against particular religious, national, or racial minorities,” or reflects “prejudice against discrete and insular minorities” who cannot be expected to protect their interests adequately in the legislative process.

Three more factors were mentioned in *Frontiero v. Richardson*,³ excerpted at §22.2: whether the classification burdens an immutable characteristic, like race or gender; whether the classification, even if not immutable, burdens an individual for something not the product of that individual’s choice, contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing; and whether the classification is viewed by the judge as a product of false stereotypes about individuals, particularly if based on outmoded notions of the relative capabilities of individuals or part of an historical pattern of discrimination.

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¹ 118 U.S. 356, 369 (1886).
² 304 U.S. 144, 152 n.4 (1938).
A final two factors are discussed in *City of Cleburne v. Cleburne Living Center*,\(^4\) excerpted below: to what extent are judges competent to make the substantive decisions required at heightened scrutiny which involve scrutinizing the legislative judgment as to whether the ends are sufficiently important or compelling, the means are sufficiently narrowly tailored or necessary, and whether any alternatives to the legislation would be effective or not; and would a Pandora’s Box be opened up where heightened scrutiny in the case would lead to demands for heightened scrutiny in other similarly situated cases, creating increased litigation and more unpredictability in the law. Minimum rationality review discourages litigation given its strong presumption of constitutionality.

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**City of Cleburne v. Cleburne Living Center**

473 U.S. 432 (1985)

Justice WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a “quasi-suspect” classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate.

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, United States Railroad Retirement Board v. Fritz, 449 U.S., at 174, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Graham v. Richardson, 403 U.S. 365 (1971). Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) [Ed.: right to vote, at § 24.2]; Shapiro v. Thompson, 394 U.S. 618 (1969) [Ed.: right to travel, at § 27.3]; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) [Ed.: right to procreate, at § 25.3].

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. “[W]hat differentiates sex from

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such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.” Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary. Thus, the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs, see § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, but it has also provided the retarded with the right to receive “appropriate treatment, services, and habilitation” in a setting that is “least restrictive of [their] personal liberty.” Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1),(2). In addition, the Government has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, “to the maximum extent appropriate,” is integrated with that of nonmentally retarded children. Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B). The Government has also facilitated the hiring of the mentally retarded into the federal civil service by exempting them from the requirement of competitive examination. See 5 CFR § 213.3102(t) (1984). The State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded by conferring certain rights upon them, such as “the right to live in the least restrictive setting appropriate to [their] individual needs and abilities,” including “the right to live . . . in a group home.” Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann., Art. 5547-300, § 7 (Vernon Supp.1985).

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast.
majority of situations is not only legitimate but also desirable. It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. See Brief for Respondents 38-41. The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. The Education of the Handicapped Act, for example, requires an “appropriate” education, not one that is equal in all respects to the education of nonretarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate. Similarly, the Developmental Disabilities Assistance Act and the Texas Act give the retarded the right to live only in the “least restrictive setting” appropriate to their abilities, implicitly assuming the need for at least some restrictions that would not be imposed on others. Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course . . . .

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See Zobel v. Williams, 457 U.S. 55, 61-63 (1982); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 535 (1973). Furthermore, some objectives – such as “a bare . . . desire to harm a politically unpopular group,” id., at 534 – are not legitimate state interests. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law. [Ed.: The Court then held that the government denial of the permit for the home for the mentally retarded was unconstitutional under minimum rationality review, excerpted at § 19.3]
Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, concurring in the judgment in part and dissenting in part.

I have long believed the level of scrutiny employed in an equal protection case should vary with “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.” San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting). See also Plyler v. Doe, 457 U.S. 202, 230-231 (1982) (Marshall, J., concurring). When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

First, the interest of the retarded in establishing group homes is substantial. The right to “establish a home” has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Second, the mentally retarded have been subject to a “lengthy and tragic history,” University of California Regents v. Bakke, 438 U.S. 265, 303 (1978) (opinion of Powell, J.), of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the “science” of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the “feeble-minded” as a “menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.” A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and “nearly extinguish their race.” Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded “unfit for citizenship.”

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the “basic civil rights of man” – the right to marry and procreate. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942). Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931. J. Landman, Human Sterilization 302-303 (1932). See Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.); cf. Plessy v. Ferguson, 163 U.S. 537 (1896); Bradwell v. Illinois, 16 Wall. 130, 141 (1873) (Bradley, J., concurring in judgment).

disqualified “idiots” from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. Not until Congress enacted the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., were “the door[s] of public education” opened wide to handicapped children. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 192 (1982). But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.

The government must establish that the classification is substantially related to important and legitimate objectives, see, e.g., Craig v. Boren, 429 U.S. 190 (1976), so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate.

§ 23.2 Alienage Classifications: Strict, Intermediate & Minimum Rationality Review

1. State Classifications Applied to Legal Resident Aliens: Strict Scrutiny

In the late 1800s and early 1900s, the Supreme Court applied a rational basis standard of review in cases involving state action that disadvantaged aliens. This standard was applied in a manner that allowed states to disadvantage aliens in a number of ways. States could bar aliens from harvesting wildlife, working on public projects, or owning land. During those years there were only a few protective decisions, such as Yick Wo v. Hopkins, excerpted at § 20.4, where it was held unconstitutional to enforce a wooden laundry statute only against Chinese, a case based on the ethnic discrimination aspect of the government action, not on alienage, and Truax v. Raich, where it was held unreasonable for a state to bar lawfully residing aliens from common employment, since that conflicted with the federal policy granting those aliens a right to reside in the United States.

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7 Terrace v. Thompson, 263 U.S. 197 (1923); Hauenstein v. Lynham, 100 U.S. 483 (1880).
8 118 U.S. 356 (1896).
9 239 U.S. 33 (1915).
During the Holmesian era, the Court made a slight inroad on previous case results. In 1948, the Court cited to the Japanese internment case of *Korematsu*, excerpted at § 20.2, and its “suspect classification” doctrine, in holding that California could not bar lawfully resident aliens from making a living by fishing off the coast because that, as in *Truax*, conflicted with federal policy. The Court also held that a California statute discriminating against certain aliens from owning agricultural land was unconstitutional because, as in *Yick Wo*, it actually operated as a discrimination based upon ethnicity, in this case Japanese-Americans.

During the instrumentalist era, the Court took a bigger step. In 1971, in *Graham v. Richardson*, excerpted below, the Court held that with respect to persons in the United States alienage is a “suspect classification.” Following *Graham v. Richardson*, strict scrutiny was used during the 1970s to strike down state statutes banning aliens from working in fields as diverse as the classified civil service, practicing law, or becoming an engineer.

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**Graham v. Richardson**  
403 U.S. 365 (1971)

Justice BLACKMUN delivered the opinion of the Court.

These are welfare cases. They provide yet another aspect of the widening litigation in this area. The issue here is whether the Equal Protection Clause of the Fourteenth Amendment prevents a State from conditioning welfare benefits either (a) upon the beneficiary's possession of United States citizenship, or (b) if the beneficiary is an alien, upon his having resided in this country for a specified number of years.

II

The appellants argue initially that the States, consistent with the Equal Protection Clause, may favor United States citizens over aliens in the distribution of welfare benefits. It is said that this distinction involves no ‘invidious discrimination’ such as was condemned in *King v. Smith*, 392 U.S. 309 (1968), for the State is not discriminating with respect to race or nationality.

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10 Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948).
The Fourteenth Amendment provides, “[N]or 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.” It has long been settled, and it is not disputed here, that the term “person” in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S., at 420 [(1948)]. Nor is it disputed that the Arizona and Pennsylvania statutes in question create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country. Otherwise qualified United States citizens living in Arizona are entitled to federally funded categorical assistance benefits without regard to length of national residency, but aliens must have lived in this country for 15 years in order to qualify for aid. United States citizens living in Pennsylvania, unable to meet the requirements for federally funded benefits, may be eligible for state-supported general assistance, but resident aliens as a class are precluded from that assistance.

Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). This is so in “the area of economics and social welfare.” Dandridge v. Williams, 397 U.S. 471, 485 (1970). But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a “discrete and insular” minority (see United States v. Carolene Products Co., 304 U.S. 144, 152-153, n.4 (1938)) for whom such heightened judicial solicitude is appropriate. . . .

We conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens.

We agree with the three-judge court in the Pennsylvania case that the “justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. . . . [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state.” 321 F.Supp., at 253.

III

An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations. The National Government has “broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.” Takahashi v. Fish & Game Comm’n, 334 U.S., at 419. Pursuant to that power, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that “[a]liens who are paupers, professional beggars, or vagrants” or aliens who “are likely at any time to become public charges” shall be excluded from admission into the United States, 8 U.S.C. §§ 1182(a)(8) and 1182(a)(15), and that any alien lawfully admitted shall be
deported who “has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry. . . . “ 8 U.S.C. § 1251(a)(8). Admission of aliens likely to become public charges may be conditioned upon the posting of a bond or cash deposit. 8 U.S.C. § 1183. But Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. Rather, it has broadly declared: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .” 42 U.S.C. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens. Takahashi, 334 U.S., at 419 n.7. Moreover, this Court has made it clear that, whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union “on an equality of legal privileges with all citizens under nondiscriminatory laws.” Takahashi, 334 U.S., at 420.

State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government. In Hines v. Davidowitz, 312 U.S., at 66-67 [(1941)], where this Court struck down a Pennsylvania alien registration statute (enacted in 1939, as was the statute under challenge in No. 727) on grounds of federal pre-emption, it was observed that “where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”

IV

[Ed. In Part IV, the Court rejected the argument that the Arizona 15-year durational residency requirement was authorized by federal law.]

Justice HARLAN joins in Parts III and IV of the Court's opinion, and in the judgment of the Court.

As indicated by Part III of the Court’s opinion in Graham v. Richardson, in addition to an equal protection violation, the Court also held in Graham that durational residence requirements for welfare to aliens were preempted by congressional policy of not imposing burdens on aliens who become indigent after their entry into the United States. In Toll v. Moreno,16 the Court held that states may not impose discriminatory tuition fees on holders of G-4 visas because Congress, in issuing such visas to officers and employees of international organizations and their families, did not contemplate that states might impose such charges. But see Korab v. Fink, 748 F.3d 875 (9th Cir. 2014) (constitutional under rational review for state to deny Medicaid benefits to “nonimmigrant aliens” residing in Hawaii under Compact of Free Association with the United States where federal law gave states freedom to decide whether to cover them).

16 458 U.S. 1, 13-17 (1982).
2. State Classifications and Political Functions: Minimum Rationality Review

Under the “political function” exception, if state employment positions involve functions that go to the heart of representative government, barriers against even legal resident aliens are given only minimum rationality review. The reason is that states may establish their own form of government, and thus limit the right to govern and exercise discretionary state power over others to persons who are full-fledged members of the political community.17

To determine whether the “political function” exception applies, the Court uses a two-part test first announced in Cabell v. Chavez-Salido.18 Applying the Cabell test, the Court asks two questions:

   (1) Does the classification serve legitimate political ends, determined in part by asking whether the classification is substantially overinclusive or underinclusive, or does it apply to a well-defined job classification, and
   (2) If the classification is sufficiently narrowly tailored, is the job invested with policy-making responsibility or broad discretion in the execution of public policy which requires the routine exercise of authority over other individuals.

Applying the above tests, the Court concluded in Bernal v. Fainter19 that a Texas law that barred aliens from service as a notary public was not within this exception and did not pass strict scrutiny. The Court noted that a notary's duties, essentially clerical and ministerial, do not go to the heart of representative government. Jobs that have been held to involve a “political function” include police officers, probation officers, and service on juries.20 “Political functions” also include the right to vote or hold elective or non-elective executive, legislative, and judicial positions held “by officers who participate directly in the formulation, execution, or review of broad public policy.”21


Ambach v. Norwick
441 U.S. 68 (1979)

Justice POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional constraints. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in Truax v. Raich, 239 U.S. 33 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's “right to work for a living in the common occupations of the community . . . .” Id., at 41. At the same time, however, the Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. At the time Truax was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to “the regulation or distribution of the public domain, or of the common property or resources of the people of the State . . . .” Id., at 39. Hence, as part of a larger authority to forbid aliens from owning land, Frick v. Webb, 263 U.S. 326 (1923); McCready v. Virginia, 94 U.S. 391 (1877); or maintaining an inherently dangerous enterprise, Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927), States permissibly could exclude aliens from working on public construction projects, Crane v. New York, 239 U.S. 195 (1915), and, it appears, from engaging in any form of public employment at all, see Truax, supra, 239 U.S., at 40.

Over time, the Court's decisions gradually have restricted the activities from which States are free to exclude aliens. The first sign that the Court would question the constitutionality of discrimination against aliens even in areas affected with a “public interest” appeared in Oyama v. California, 332 U.S. 633 (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban on alien landholding discriminated against the citizen children of aliens. The same Term, the Court held that the “ownership” a State exercises over fish found in its territorial waters “is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.” Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421 (1948). This process of withdrawal from the former doctrine culminated in Graham v. Richardson, supra, which for the first time treated classifications based on alienage as “inherently suspect and subject to close judicial scrutiny.” 403 U.S., at 372. Applying Graham, this Court has held invalid statutes that prevented aliens from entering a State's classified civil service, Sugarman v. Dougall, 413 U.S. 634 (1973), practicing law, In re Griffiths, 413 U.S. 717 (1973), working as an engineer, Examining Board v. Flores de Otero, 426 U.S. 572 (1976), and receiving state educational benefits, Nyquist v. Mauclet, 432 U.S. 1 (1977).
Although our more recent decisions have departed substantially from the public-interest doctrine of *Truax* ’s day, they have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. In *Sugarman*, we recognized that a State could, “in an appropriately defined class of positions, require citizenship as a qualification for office.” We went on to observe: “Such power inheres in the State by virtue of its obligation, . . . ‘to preserve the basic conception of a political community’ . . . [T]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.” 413 U.S., at 647 (citation omitted).

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. Id., at 648. See also Perkins v. Smith, 370 F. Supp. 134 (D.C.Md.1974), summarily aff’d, 426 U.S. 913 (1976) [Ed.: permissible to exclude aliens from service on jury].

[W]e held last Term that New York could exclude aliens from the ranks of its police force. Foley v. Connelie, 435 U.S. 291 (1978). Because the police function fulfilled “a most fundamental obligation of government to its constituency” and by necessity cloaked policemen with substantial discretionary powers, we view the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. Id., at 297. Accordingly, the State was required to justify its classification only “by a showing of some rational relationship between the interest sought to be protected and the limiting classification.” Id., at 296.

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall*, supra, 413 U.S. at 651-652 (Rehnquist, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. See Foley v. Connelie, supra, 435 U.S., at 295. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.

In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. See Foley v. Connelie, supra, at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task “that go[es] to the heart of representative government.” *Sugarman* v. *Dougall*, supra, 413 U.S., at 647.
Public education, like the police function, “fulfills a most fundamental obligation of government to its constituency.” Foley, supra, 435 U.S., at 297. The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions: “Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system. Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects. More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the “governmental function” principle recognized in Sugarman and Foley. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether [New York Education Law] § 3001(3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship. Appellees, and aliens similarly situated, in effect have chosen to classify themselves.
They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty. They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001(3) furthers that judgment.

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Once again the Court is asked to rule upon the constitutionality of one of New York's many statutes that impose a requirement of citizenship upon a person before that person may earn his living in a specified occupation. These New York statutes, for the most part, have their origin in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day. This time we are concerned with the right to teach in the public schools of the State, at the elementary and secondary levels, and with the citizenship requirement [imposed by] N.Y. Educ. Law § 3001(3) (McKinney 1970).

As the Court acknowledges, its decisions regarding the permissibility of statutory classifications concerning aliens “have not formed an unwavering line over the years.” Thus, just last Term, in Foley v. Connellie, 435 U.S. 291 (1978), the Court upheld against equal protection challenge the New York statute limiting appointment of members of the state police force to citizens of the United States. The touchstone, the Court indicated, was that citizenship may be a relevant qualification for fulfilling “‘important nonelective executive, legislative, and judicial positions’ held by ‘officers who participate directly in the formulation, execution, or review of broad public policy.’” Id., at 296, quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973). For such positions, a State need show only some rational relationship between the interest sought to be protected and the limiting classification. Police, it then was felt, were clothed with authority to exercise an almost infinite variety of discretionary powers that could seriously affect members of the public. 435 U.S., at 297. They thus fell within the category of important officers who participate directly in the execution of “broad public policy.” The Court was persuaded that citizenship bore a rational relationship to the special demands of police positions, and that a State therefore could constitutionally confine that public responsibility to citizens of the United States. Id., at 300. The propriety of making citizenship a qualification for a narrowly defined class of positions was also recognized in passing, in Sugarman v. Dougall, 413 U.S., at 647, and in Nyquist v. Mauclet, 432 U.S. 1, 11 (1977).

On the other hand, the Court frequently has invalidated a state provision that denies a resident alien the right to engage in specified occupational activity: Yick Wo v. Hopkins, 118 U.S. 356 (1886) (ordinance applied so as to prevent Chinese subjects from engaging in the laundry business); Truax v. Raich, 239 U.S. 33 (1915) (statute requiring an employer's work force to be composed of not less than 80% “qualified electors or native-born citizens”); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (limitation of commercial fishing licenses to persons not “ineligible to citizenship”); Sugarman v. Dougall, supra (New York statute relating to permanent positions in the “competitive class” of the state civil service); In re Griffiths, 413 U.S. 717 (1973) (the practice of law); Nelson v. Miranda, 413 U.S. 902 (1973), summarily aff'd 351 F. Supp. 735 (D.C.Ariz.1972) (social service
worker and teacher); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (the practice of civil engineering). See also Nyquist v. Mauclet, supra (New York statute barring certain resident aliens from state financial assistance for higher education).

Indeed, the Court has held more than once that state classifications based on alienage are “inherently suspect and subject to close judicial scrutiny.” Graham v. Richardson, 403 U.S. 365, 372 (1971). See Examining Board v. Flores de Otero, 426 U.S., at 601-602; In re Griffiths, 413 U.S., at 721; Sugarman v. Dougall, 413 U.S., at 642; Nyquist v. Mauclet, 432 U.S., at 7. And “[a]lienage classifications by a State that do not withstand this stringent examination cannot stand.” Ibid.

There is thus a line, most recently recognized in Foley v. Connelie, between those employments that a State in its wisdom constitutionally may restrict to United States citizens, on the one hand, and those employments, on the other, that the State may not deny to resident aliens. For me, the present case falls on the Sugarman-Griffiths-Flores de Otero-Mauclet side of that line, rather than on the narrowly isolated Foley side.

We are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels. It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language. The appellees, to be sure, are resident “aliens” in the technical sense, but there is not a word in the record that either appellee does not have roots in this country or is unqualified in any way, other than the imposed requirement of citizenship, to teach. Both appellee Norwick and appellee Dachinger have been in this country for over 12 years. Each is married to a United States citizen. Each currently meets all the requirements, other than citizenship, that New York has specified for certification as a public school teacher. Tr. of Oral Arg. 4. Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York. Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay. Appellees, however, have hesitated to give up their respective British and Finnish citizenships, just as lawyer Fre Le Poole Griffiths, the subject of In re Griffiths, supra, hesitated to renounce her Netherlands citizenship, although married to a citizen of the United States and a resident of Connecticut.

But the Court, to the disadvantage of appellees, crosses the line from Griffiths to Foley by saying that the “distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State.” It then concludes that public school teaching “constitutes a governmental function,” ibid., and that public school teachers may be regarded as performing a task that goes “to the heart of representative government.” The Court speaks of the importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests. After then observing that teachers play a critical part in all this, the Court holds that New York's citizenship requirement is constitutional because it bears a rational relationship to the State's interest in furthering these educational goals.
I perceive a number of difficulties along the easy road the Court takes to this conclusion:

[T]he New York statutory structure itself refutes the argument. Section 3001(3), the very statute at issue here, provides for exceptions with respect to alien teachers “employed pursuant to regulations adopted by the commissioner of education permitting such employment.” Section 3001-a (McKinney 1970) provides another exception for persons ineligible for United States citizenship because of oversubscribed quotas. Also, New York is unconcerned with any citizenship qualification for teachers in the private schools of the State, even though the record indicates that about 18% of the pupils at the elementary and secondary levels attend private schools. The education of those pupils seems not to be inculcated with something less than what is desirable for citizenship and what the Court calls an influence “crucial to the continued good health of a democracy.”

[T]he New York classification is irrational. Is it better to employ a poor citizen teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America? The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently. That is the way to accomplish the desired result. An artificial citizenship bar is not a rational way. It is, instead, a stultifying provision. The route to “diverse and conflicting elements” and their being “brought together on a broad but common ground,” which the Court so emphasizes, is hardly to be achieved by disregarding some of the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide.

[I]t is logically impossible to differentiate between this case concerning teachers and In re Griffiths concerning attorneys. If a resident alien may not constitutionally be barred from taking a state bar examination and thereby becoming qualified to practice law in the courts of a State, how is one to comprehend why a resident alien may constitutionally be barred from teaching in the elementary and secondary levels of a State's public schools? One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values. Are the attributes of an attorney any the less?

If an attorney has a constitutional right to take a bar examination and practice law, despite his being a resident alien, it is impossible for me to see why a resident alien, otherwise completely competent and qualified, as these appellees concededly are, is constitutionally disqualified from teaching in the public schools of the great State of New York. The District Court expressed it well and forcefully when it observed that New York's exclusion “seems repugnant to the very heritage the State is seeking to inculcate.” Norwick v. Nyquist, 417 F.Supp. 913, 922 (SDNY 1976).

Most public schools systems today do not have “citizenship” requirements for teaching. They actively seek qualified teachers, including lawful resident aliens, who have the appropriate qualifications, particularly in areas like language, science, and math. In 2002, New York Education Law § 3001's citizenship requirement was waived for 5 years, that waiver later extended until 2017.

Aliens who are illegally in the United States have also been held entitled to protection under the Equal Protection and Due Process Clauses, as they are “persons” textually entitled to such protection. However, they have not been characterized as a suspect class because entry into the class is the result of a voluntary criminal act. Thus, state regulations affecting illegal aliens are typically subjected to minimum rationality review.\(^{22}\) However, in *Plyler v Doe*, a case involving the rights of the children of illegal immigrants to attend public school, a 5-4 Court applied the intermediate scrutiny requirement of a “substantial” government interest, not rational review “legitimate” interest, to find that Texas could not deny free public education to the children of illegal immigrants.

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**Plyler v. Doe**

*457 U.S. 202 (1982)*

Justice BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U.S.C. § 1325, and those who have entered unlawfully are subject to deportation, 8 U.S.C. §§ 1251, 1252 (1976 ed. and Supp.IV). But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including . . . Texas.

In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not “legally admitted” into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not “legally admitted” to the country. Tex. Educ. Code Ann. § 21.031 (Vernon Supp.1981). [FN 2: Despite the enactment of § 21.031 in 1975, the School District had continued to enroll undocumented children free of charge until the 1977-1978 school year. In July 1977, it adopted a policy requiring undocumented children to pay a full tuition fee in order to enroll.]

After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District [in September 1977], the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. [The District Court later entered a permanent injunction, 458 F. Supp. 569 (E.D. Tex. 1978), which was affirmed by the Court of Appeals for the Fifth Circuit, 628 F.2d 448 (5th Cir. 1980)]

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The Fourteenth Amendment provides that “[n]o State shall . . . 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.” (Emphasis added.) Appellants argue at the outset that undocumented aliens, because of their immigration status, are not “persons within the jurisdiction” of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments. Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons within its jurisdiction while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not “within the jurisdiction” of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase “within its jurisdiction.” [FN10: Although we have not previously focused on the intended meaning of this phrase, we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . .” (Emphasis added.) Justice Gray, writing for the Court in United States v. Wong Kim Ark, 169 U.S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly geographic sense in which the term “jurisdiction” was used. He further noted that it was “impossible to construe the words ‘subject to the jurisdiction thereof,’ in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words ‘within its jurisdiction,’ in the concluding sentence of the same section; or to hold that persons ‘within the jurisdiction’ of one of the States of the Union are not ‘subject to the jurisdiction of the United States.’” Id., at 687.] We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority.

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants – numbering in the millions [Ed.: estimated at 3-6 million in 1982 and 10-12 million by 2010] – within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments
do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents' conduct nor their own status.” Trimble v. Gordon, 430 U.S. 762, 770. Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

“[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent.” Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (footnote omitted).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a “constitutional irrelevancy.” Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. See San Antonio Independent School Dist. v. Rodriguez, [411 U.S.], at 28-39 [(1973)]. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State. [Ed.: The Court has since made clear in Kadrmas v. Dickinson Public School, 487 U.S. 450, 459 (1988), that this “substantial goal” language reflects intermediate review, with the burden on the state to justify its action.]

Appellants argue that the classification at issue furthers an interest in the “preservation of the state's limited resources for the education of its lawful residents.” Brief for Appellants 26. Of course, a

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, § 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. 458 F.Supp., at 578; 501 F.Supp., at 570-571. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education. Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that “[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,” at least when compared with the alternative of prohibiting the employment of illegal aliens. 458 F.Supp., at 585. See 628 F.2d, at 461; 501 F.Supp., at 579 and n.88.

Second, while it is apparent that a State may “not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools,” Shapiro v. Thompson, 394 U.S. 618, 633 (1969), appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State. [FN 25: Nor does the record support the claim that the educational resources of the State are so direly limited that some form of “educational triage” might be deemed a reasonable (assuming that it were a permissible) response to the State's problems. [501 F. Supp.] at 579-581.] As the District Court in No. 80-1934 noted, the State failed to offer any “credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education.” 501 F.Supp., at 583. And, after reviewing the State's school financing mechanism, the District Court in No. 80-1538 concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. 458 F.Supp., at 577. Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are “basically indistinguishable” from legally resident alien children. Id., at 589; 501 F.Supp., at 583, and n.104.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use.
within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.

Chief Justice BURGER, with whom Justice WHITE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children – including illegal aliens – of an elementary education. I fully agree that it would be folly – and wrong – to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as “Platonic Guardians” nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, “wisdom,” or “common sense.” See TVA v. Hill, 437 U.S. 153, 194-195 (1978). We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

The Court acknowledges that, except in those cases when state classifications disadvantage a “suspect class” or impinge upon a “fundamental right,” the Equal Protection Clause permits a state “substantial latitude” in distinguishing between different groups of persons. Moreover, the Court expressly – and correctly – rejects any suggestion that illegal aliens are a suspect class, or that education is a fundamental right. Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.

In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education. If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.

The Court does not presume to suggest that appellees' purported lack of culpability for their illegal status prevents them from being deported or otherwise “penalized” under federal law. Yet would deportation be any less a “penalty” than denial of privileges provided to legal residents? [FN 6: Indeed, even children of illegal alien parents born in the United States can be said to be “penalized”
when their parents are deported.] Illegality of presence in the United States does not – and need not – depend on some amorphous concept of “guilt” or “innocence” concerning an alien's entry. Similarly, a state's use of federal immigration status as a basis for legislative classification is not necessarily rendered suspect for its failure to take such factors into account.

The Court's analogy to cases involving discrimination against illegitimate children is grossly misleading. The State has not thrust any disabilities upon appellees due to their “status of birth.” Cf. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 176 (1972). Rather, appellees' status is predicated upon the circumstances of their concededly illegal presence in this country, and is a direct result of Congress' obviously valid exercise of its “broad constitutional powers” in the field of immigration and naturalization. U.S. Const., Art. 1, § 8, cl. 4; see Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948). This Court has recognized that in allocating governmental benefits to a given class of aliens, one “may take into account the character of the relationship between the alien and this country.” Mathews v. Diaz, 426 U.S. 67, 80 (1976). When that “relationship” is a federally prohibited one, there can, of course, be no presumption that a state has a constitutional duty to include illegal aliens among the recipients of its governmental benefits.

Once it is conceded – as the Court does – that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose. Vance v. Bradley, 440 U.S. 93, 97 (1979); Dandridge v. Williams, 397 U.S. 471, 485-487 (1970).

The State contends primarily that § 21.031 serves to prevent undue depletion of its limited revenues available for education, and to preserve the fiscal integrity of the State's school-financing system against an ever-increasing flood of illegal aliens – aliens over whose entry or continued presence it has no control. Of course such fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons. Yet I assume no Member of this Court would argue that prudent conservation of finite state revenues is per se an illegitimate goal. Indeed, the numerous classifications this Court has sustained in social welfare legislation were invariably related to the limited amount of revenues available to spend on any given program or set of programs. See, e.g., Jefferson v. Hackney, 406 U.S., at 549-551; Dandridge v. Williams, supra, at 487. The significant question here is whether the requirement of tuition from illegal aliens who attend the public schools – as well as from residents of other states, for example – is a rational and reasonable means of furthering the State's legitimate fiscal ends.

Without laboring what will undoubtedly seem obvious to many, it simply is not “irrational” for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state. In DeCanas v. Bica, 424 U.S. 351, 357 (1976), we held that a State may protect its “fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens.” And only recently this Court made clear that a State has a legitimate interest in protecting and preserving the quality of its schools and “the
right of its own bona fide residents to attend such institutions on a preferential tuition basis.” Vlandis v. Kline, 412 U.S. 441, 453 (1973) (emphasis added). See also Elkins v. Moreno, 435 U.S. 647, 663-668 (1978). The Court has failed to offer even a plausible explanation why illegality of residence in this country is not a factor that may legitimately bear upon the bona fides of state residence and entitlement to the benefits of lawful residence.

It is significant that the Federal Government has seen fit to exclude illegal aliens from numerous social welfare programs, such as the food stamp program, 7 U.S.C. § 2015(f) (1976 ed. and Supp. IV) and 7 CFR § 273.4 (1981), the old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs, 45 CFR § 233.50 (1981), the Medicare hospital insurance benefits program, 42 U.S.C. § 1395i–2 and 42 CFR § 405.205(b) (1981), and the Medicaid hospital insurance benefits for the aged and disabled program, 42 U.S.C. § 1395o and 42 CFR § 405.103(a)(4) (1981). Although these exclusions do not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tend to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents. See Mathews v. Diaz, 426 U.S., at 80.

The Court maintains – as if this were the issue – that “barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools.” See 458 F.Supp. 569, 577 (ED Tex.1978). However, the legitimacy of barring illegal aliens from programs such as Medicare or Medicaid does not depend on a showing that the barrier would “improve the quality” of medical care given to persons lawfully entitled to participate in such programs. Modern education, like medical care, is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools. The State may, in its discretion, use any savings resulting from its tuition requirement to “improve the quality of education” in the public school system, or to enhance the funds available for other social programs, or to reduce the tax burden placed on its residents; each of these ends is “legitimate.” The State need not show, as the Court implies, that the incremental cost of educating illegal aliens will send it into bankruptcy, or have a “‘grave impact on the quality of education’”; that is not dispositive under a “rational basis” scrutiny. In the absence of a constitutional imperative to provide for the education of illegal aliens, the State may “rationally” choose to take advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own lawful residents, excluding even citizens of neighboring States.

The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. Lindsey v. Normet, 405 U.S., at 74. See Reynolds v. Sims, 377 U.S. 533, 624-625 (1964) (Harlan, J., dissenting). Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes.

Federal action with respect to aliens – whether by Congress, the President, or administrative agencies pursuant to validly delegated power – is tested by minimum rationality review. Congress has the primary responsibility for regulating the relations between the United States and aliens. Further, the fact that such regulations may implicate foreign relations also supports a very deferential standard of review of decisions made by Congress or the President over regulation of aliens. As the Court noted in 1976 in *Mathews v. Diaz,* "In the exercise of its broad power over naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." Based on this extra level of deference in applying minimum rationality review, the Court held that Congress may condition medical benefits to aliens on continuous residence for 5 years or on admission for permanent residence. State statutes that incorporate such federal rules for the treatment of aliens, as can occur under the Medicaid program, similarly trigger only minimum rationality review.

23 See generally Liza Porteus, *States Grapple with In-State Tuition for Illegal Immigrants* (March 6, 2006) (Foxnews.com) (search using words in the article’s title).


26 See, e.g., Soskin v. Reinertson, 353 F.3d 1242, 1247-57 (10th Cir. 2004) (Colorado statute that eliminated Medicaid coverage for some aliens constitutional under minimum rationality review because federal 1996 Personal Responsibility and Work Opportunity Reconciliation Act permits states to stop funding Medicaid benefits for aliens who are not “qualified aliens”).
§ 23.3 Illegitimacy Classifications and Intermediate Review

With respect to illegitimacy classifications, the Court applied rational basis scrutiny until 1977. For example, in 1968, the Court held in *Levy v. Louisiana*,\(^{27}\) that even minimum rationality review was not met by a statute that permitted legitimate, but not illegitimate, children to sue for wrongful death of their mother. Formalist Justice Black, and Holmesian Justices Harlan and Stewart, dissented. Three years later, over the dissent of Justices Brennan, Douglas, White, and Marshall, the Court allowed in *Labine v. Vincent*\(^{28}\) a state to deny intestate succession to illegitimate children acknowledged, but not legitimated, by the father. However, that decision was soon followed by four decisions which found state laws treating illegitimate children differently not supported by any legitimate state interest, with only deference-to-government Holmesian Justice Rehnquist dissenting on the merits.\(^{29}\)

In 1976, in *Mathews v. Lucas*,\(^{30}\) the trial court indicated its view that illegitimacy should be treated as a suspect classification, requiring strict scrutiny. The Supreme Court reversed and analogized the case to *Reed v. Reed*, excerpted at § 22.2. Under that standard, the challenger failed to meet the burden of showing that it was unreasonable to condition the eligibility of certain illegitimate children for a surviving child's insurance benefits upon a showing that the deceased wage earner was the claimant child's parent and, at the time of his death, was living with the child or was contributing to support. The presumption of dependency for legitimate children, while the presumption of non-dependency for illegitimate children, was viewed as reasonable and saved money in administering the insurance benefits program, a legitimate government interest.

The Court’s decision that same year in *Craig v. Boren*, excerpted at § 22.2, adopting what has come to be known as intermediate review, changed the Court’s view regarding the appropriate level of scrutiny for classifications involving illegitimacy in cases after 1976. Instead of having only two choices, minimum rationality review and strict scrutiny, and rejecting strict scrutiny, as in *Mathews*, the Court now had a third definable option, intermediate scrutiny.

\(^{27}\) 391 U.S. 68, 71-72 (1968); *id.* at 76 (Harlan, J., joined by Black & Stewart, JJ., dissenting).


In *Trimble v. Gordon*, 31 decided in 1977, the Court used the phrase “carefully tuned” and “carefully tailored,” which is similar to the “closely related’ or “substantially related” language of intermediate scrutiny, to hold that classifications based on illegitimacy are invalid under the 14th Amendment if they are not so related to “permissible state interests.” Critical to applying this standard of review was the observation that illegitimate children are not responsible for their status, the same factor that later supported intermediate review in *Plyler v Doe*, excerpted above at § 23.2.3.

Applying that standard of scrutiny in *Trimble*, the Court declared invalid an Illinois law that allowed an illegitimate child to inherit from its father only if the father had acknowledged the child and married its mother. Justice Powell said that the classification affecting illegitimate children was not substantially related to the goal of protecting the orderly distribution of estates. Justice Powell explained that the law excluded significant categories of illegitimate children who could be allowed to inherit without jeopardizing the orderly settlement of estates, e.g., those who had a court order of paternity. Applying rational basis scrutiny of *Labine v. Vincent*, discussed above at § 23.3 n.28, Chief Justice Burger, and Justices Stewart, Rehnquist, and Blackmun, dissented.

The following year, in *Lalli v. Lalli*, 32 Justice Powell, writing for a 5-4 Court and applying the intermediate standard of review articulated in *Trimble*, upheld a New York statute that allowed illegitimate children to inherit from their father only if an order of filiation had been entered during the father's lifetime. Justice Powell admitted that some children who might be able to prove paternity without serious disruption of estate administration would be excluded, but the statute was the product of careful study, minimized the possibility of delay and uncertainty, enhanced accuracy, and made fraudulent assertions of paternity less likely to succeed. The Court noted that the state’s interests in the case were “substantial,” thus foreshadowing complete adoption of intermediate scrutiny in these cases, even though nominally the Court followed the *Trimble* language of requiring only that the statute be substantially related to “permissible” interests. Dissenting Justice Brennan, joined by Justices White, Marshall, and Stevens, agreed that intermediate scrutiny was the proper standard, but said that the statute excluded forms of proof, such as acknowledgment of the child or marriage to the mother, and thus was not substantially related to advancing the state’s interests.

A result more favorable to illegitimate children was reached in *Clark v. Jeter*, 33 decided in 1988. Under Pennsylvania law, an illegitimate child had to prove paternity before seeking support from the father. Legitimate children could seek support at any time, but illegitimate children had to sue within six years of birth. The Court held that the classification was not “substantially related to an important governmental objective,” thus clearly phrasing the test in terms of standard intermediate scrutiny review. That is the standard that the Court uses today for illegitimacy classifications.

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31 430 U.S. 762, 769-73 & n.14 (1977); id. at 776-77 (Burger, C.J., joined by Stewart, Rehnquist & Blackmun, JJ., dissenting).


Justice KENNEDY delivered the opinion of the Court.

This case presents a question not resolved by a majority of the Court in a case before us three Terms ago. See Miller v. Albright, 523 U.S. 420 (1998). Title 8 U.S.C. § 1409 governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions. The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. The question before us is whether the statutory distinction is consistent with the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.

Petitioner Tuan Anh Nguyen was born in Saigon, Vietnam, on September 11, 1969, to copetitioner Joseph Boulais and a Vietnamese citizen. Boulais and Nguyen's mother were not married. Boulais always has been a citizen of the United States, and he was in Vietnam under the employ of a corporation. After he and Nguyen's mother ended their relationship, Nguyen lived for a time with the family of Boulais' new Vietnamese girlfriend. In June 1975, Nguyen, then almost six years of age, came to the United States. He became a lawful permanent resident and was raised in Texas by Boulais.

In 1992, when Nguyen was 22, he pleaded guilty in a Texas state court to two counts of sexual assault on a child. He was sentenced to eight years in prison on each count. Three years later, the United States Immigration and Naturalization Service (INS) initiated deportation proceedings against Nguyen as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony. See 8 U.S.C. §§ 1227(a)(2)(A)(ii) and (iii) (1994 ed., Supp. IV). Though later he would change his position and argue he was a United States citizen, Nguyen testified at his deportation hearing that he was a citizen of Vietnam. The Immigration Judge found him deportable.

Nguyen appealed to the Board of Immigration Appeals and, in 1998, while the matter was pending, his father obtained an order of parentage from a state court, based on DNA testing. By this time, Nguyen was 28 years old. The Board dismissed Nguyen's appeal, rejecting his claim to United States citizenship because he had failed to establish compliance with 8 U.S.C. § 1409(a), which sets forth the requirements for one who was born out of wedlock and abroad to a citizen father and a noncitizen mother.

Nguyen and Boulais appealed to the Court of Appeals for the Fifth Circuit, arguing that § 1409 violates equal protection by providing different rules for attainment of citizenship by children born abroad and out of wedlock depending upon whether the one parent with American citizenship is the mother or the father. The court rejected the constitutional challenge to § 1409(a). 208 F.3d 528, 535 (2000).
The Courts of Appeal have divided over the constitutionality of § 1409. Compare 208 F.3d 528 (C.A.5 2000) (case below) with Lake v. Reno, 226 F.3d 141 (C.A.2 2000), and United States v. Ahumada-Aguilar, 189 F.3d 1121 (C.A.9 1999). We granted certiorari to resolve the conflict. 530 U.S. 1305 (2000). The father is before the Court in this case; and, as all agree he has standing to raise the constitutional claim, we now resolve it.

The general requirement for acquisition of citizenship by a child born outside the United States and its outlying possessions and to parents who are married, one of whom is a citizen and the other of whom is an alien, is set forth in 8 U.S.C. § 1401(g). The statute provides that the child is also a citizen if, before the birth, the citizen parent had been physically present in the United States for a total of five years, at least two of which were after the parent turned 14 years of age.

As to an individual born under the same circumstances, save that the parents are unwed, § 1409(a) sets forth the following requirements where the father is the citizen parent and the mother is an alien:

“(1) a blood relationship between the person and the father is established by clear and convincing evidence,
“(2) the father had the nationality of the United States at the time of the person's birth,
“(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
“(4) while the person is under the age of 18 years –
“(A) the person is legitimated under the law of the person's residence or domicile,
“(B) the father acknowledges paternity of the person in writing under oath, or
“(C) the paternity of the person is established by adjudication of a competent court.”

In addition, § 1409(a) incorporates by reference, as to the citizen parent, the residency requirement of § 1401(g).

When the citizen parent of the child born abroad and out of wedlock is the child's mother, the requirements for the transmittal of citizenship are described in § 1409(c): “(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.”

Section 1409(a) thus imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother. All concede the requirements of §§ 1409(a)(3) and (a)(4), relating to a citizen father's acknowledgment of a child while he is under 18, were not satisfied in this case. We need not discuss § 1409(a)(3), however. It was added in 1986, after Nguyen's birth; and Nguyen falls within a transitional rule which allows him to elect application of either the current version of the statute, or the pre-1986 version, which contained no parallel to § 1409(a)(3). See Immigration and Nationality Act Amendments of 1986, 100 Stat. 3655; note following 8 U.S.C. § 1409; Miller, supra,
at 426, n.3 (opinion of Stevens, J.). And in any event, our ruling respecting § 1409(a)(4) is dispositive of the case. As an individual seeking citizenship under § 1409(a) must meet all of its preconditions, the failure to satisfy § 1409(a)(4) renders Nguyen ineligible for citizenship.

For a gender-based [Ed.: or illegitimacy based, as this statute involves both] classification to withstand equal protection scrutiny, it must be established “at least that the [challenged] classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”” United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982), in turn quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)). For reasons to follow, we conclude § 1409 satisfies this standard. Given that determination, we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power. See Miller, 523 U.S., at 434, n.11.

The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. See Lehr v. Robertson, 463 U.S. 248, 260, n.16 (1983) (“The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures” (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))); Trimble v. Gordon, 430 U.S. 762, 770 (1977) (“The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required . . . under their mothers' estates . . . .”). Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective. Cf. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”). Section 1409(a)(4)'s provision of three options for a father seeking to establish paternity – legitimation, paternity oath, and court order of paternity – is designed to ensure an acceptable documentation of paternity.

Petitioners argue that the requirement of § 1409(a)(1), that a father provide clear and convincing evidence of parentage, is sufficient to achieve the end of establishing paternity, given the sophistication of modern DNA tests. Brief for Petitioners 21-24. Section 1409(a)(1) does not actually mandate a DNA test, however. The Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method. With respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern to Congress. See Miller, supra, at 437 (opinion of Stevens, J.). The requirement of § 1409(a)(4) represents a reasonable conclusion by the legislature that the
satisfaction of one of several alternatives will suffice to establish the blood link between father and child required as a predicate to the child's acquisition of citizenship. Cf. Lehr, supra, at 267-268 (upholding New York statutory requirement that gave mothers of children born out of wedlock notice of an adoption hearing, but only extended that right to fathers who mailed a postcard to a “putative fathers registry”). Given the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers.

The second important governmental interest furthered in a substantial manner by § 1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States. See [Miller, supra], at 438-440 (opinion of Stevens, J.). In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.

The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries. See Department of Defense, Selected Manpower Statistics 48, 74 (1999) (reporting that in 1969, the year in which Nguyen was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female); Department of Defense, Selected Manpower Statistics 29 (1970) (noting that 1,041,094 military personnel were stationed in foreign countries in 1969); Department of Defense, Selected Manpower Statistics 49, 76 (1999) (reporting that in 1999 there were 1,385,703 active duty military personnel, 200,287 of whom were female); id., at 33 (noting that 252,763 military personnel were stationed in foreign countries in 1999).

When we turn to the conditions which prevail today, we find that the passage of time has produced additional and even more substantial grounds to justify the statutory distinction. The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of accepting petitioners' argument, which would mandate, contrary to Congress' wishes, citizenship by male parentage subject to no condition save the father's previous length of residence in this country. In 1999 alone, Americans made almost 25 million trips abroad, excluding trips to Canada and Mexico. See U.S. Dept. of Commerce, 1999 Profile of U.S. Travelers to Overseas Destinations 1 (Oct.2000). Visits to Canada and Mexico add to this figure almost 34 million additional visits. See U.S. Dept. of Commerce, U.S. Resident Travel to Overseas Countries, Historical Visitation 1989-1999, p. 1 (Oct.2000). And the average American overseas traveler spent 15.1 nights out of the United States in 1999. 1999 Profile of U.S. Travelers to Overseas Destinations, supra, at 2058.
Principles of equal protection do not require Congress to ignore this reality. To the contrary, these facts demonstrate the critical importance of the Government's interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth. Indeed, especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility. See Miller, supra, at 439 (opinion of Stevens, J.). Even if a father knows of the fact of conception, moreover, it does not follow that he will be present at the birth of the child. Thus, unlike the case of the mother, there is no assurance that the father and his biological child will ever meet. Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship. Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter.

The importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test. The fact of paternity can be established even without the father's knowledge, not to say his presence. Paternity can be established by taking DNA samples even from a few strands of hair, years after the birth. See Federal Judicial Center, Reference Manual on Scientific Evidence 497 (2d ed.2000). Yet scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority.

Even if one conceives of the interest Congress pursues as the establishment of a real, practical relationship of considerable substance between parent and child in every case, as opposed simply to ensuring the potential for the relationship to begin, petitioners' misconception of the nature of the equal protection inquiry is fatal to their argument. A statute meets the equal protection standard we here apply so long as it is “substantially related to the achievement of” the governmental objective in question. Virginia, supra, at 533 (quoting Hogan, 458 U.S., at 724, in turn quoting Wengler, 446 U.S., at 150). It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond. None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.

Justice SCALIA, with whom Justice THOMAS joins, concurring.

I remain of the view that the Court lacks power to provide relief of the sort requested in this suit – namely, conferral of citizenship on a basis other than that prescribed by Congress. See Miller v. Albright, 523 U.S. 420, 452 (1998) (Scalia, J., concurring in judgment). A majority of the Justices in Miller having concluded otherwise, see id., at 423 (opinion of Stevens, J., joined by Rehnquist, C.J.); id., at 460 (Ginsburg, J., joined by Souter and Breyer, JJ., dissenting); id., at 471 (Breyer, J., joined by Souter and Ginsburg, JJ., dissenting); and a majority of the Court today proceeding on the same assumption; I think it appropriate for me to reach the merits of petitioners' equal protection claims. I join the opinion of the Court.
Justice O'CONNOR, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex. The Court today confronts another statute that classifies individuals on the basis of their sex. While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents. Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex-based classification embodied in 8 U.S.C. § 1409(a)(4) – i.e., because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives – I would reverse the judgment of the Court of Appeals.

The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, but departs from the guidance of our precedents concerning such classifications in several ways. In the first sentence of its equal protection analysis, the majority glosses over the crucial matter of the burden of justification. *Ante,* at 2059 (“For a gender-based classification to withstand equal protection scrutiny, it must be established . . .”). In other circumstances, the Court's use of an impersonal construction might represent a mere elision of what we have stated expressly in our prior cases. Here, however, the elision presages some of the larger failings of the opinion. For example, the majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of § 1409(a)(4). The Court also does not always explain adequately the importance of the interests that it claims to be served by the provision. The majority also fails carefully to consider whether the sex-based classification is being used impermissibly “as a ‘proxy for other, more germane bases of classification,’” Mississippi Univ. for Women, 458 U.S., at 726 (quoting Craig, 429 U.S., at 198), and instead casually dismisses the relevance of available sex-neutral alternatives. And, contrary to the majority's conclusion, the fit between the means and ends of § 1409(a)(4) is far too attenuated for the provision to survive heightened scrutiny. In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.

According to the Court, “[t]he first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists.” The majority does not elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship. Nor does the majority demonstrate that this is one of the actual purposes of § 1409(a)(4). Assuming that Congress actually had this purpose in mind in enacting parts of § 1409(a)(4), cf. Miller v. Albright, 523 U.S. 420, 435-436 (1998) (opinion of Stevens, J.), the INS does not appear to rely on this interest in its effort to sustain § 1409(a)(4)'s sex-based classification. Cf. Brief for Respondent 11 (claiming that § 1409 serves “at least two important interests: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent – and thus to the United States – to justify the conferral of citizenship upon them; and second, preventing such children from being stateless”). In light of the reviewing court's duty to “determine whether the proffered justification is ‘exceedingly persuasive,’” Virginia, 518 U.S., at 533, this disparity between the majority's defense of the statute and the INS' proffered justifications is striking, to say the least.
The gravest defect in the Court's reliance on this interest, however, is the insufficiency of the fit between § 1409(a)(4)'s discriminatory means and the asserted end. Section 1409(c) imposes no particular burden of proof on mothers wishing to convey citizenship to their children. By contrast, § 1409(a)(1), which petitioners do not challenge before this Court, requires that “a blood relationship between the person and the father [be] established by clear and convincing evidence.” Atop § 1409(a)(1), § 1409(a)(4) requires legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of 18. It is difficult to see what § 1409(a)(4) accomplishes in furtherance of “assuring that a biological parent-child relationship exists,” that § 1409(a)(1) does not achieve on its own. The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of § 1409(a)(1). See Miller, supra, at 484-485 (Breyer, J., dissenting).

It is also difficult to see how § 1409(a)(4)'s limitation of the time allowed for obtaining proof of paternity substantially furthers the assurance of a blood relationship. Modern DNA testing, in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time. Moreover, the application of § 1409(a)(1)'s “clear and convincing evidence” requirement can account for any effect that the passage of time has on the quality of the evidence.

The Court criticizes petitioners' reliance on the availability and sophistication of modern DNA tests, but appears to misconceive the relevance of such tests. No one argues that § 1409(a)(1) mandates a DNA test. Legitimation or an adjudication of paternity, see §§ 1409(a)(4)(A), (C), may well satisfy the “clear and convincing” standard of § 1409(a)(1). (Satisfaction of § 1409(a)(4) by a written acknowledgment of paternity under oath, see § 1409(a)(4)(B), would seem to do little, if anything, to advance the assurance of a blood relationship, further stretching the means-end fit in this context.) Likewise, petitioners' argument does not depend on the idea that one particular method of establishing paternity is constitutionally required. Petitioners' argument rests instead on the fact that, if the goal is to obtain proof of paternity, the existence of a statutory provision governing such proof, coupled with the efficacy and availability of modern technology, is highly relevant to the sufficiency of the tailoring between § 1409(a)(4)'s sex-based classification and the asserted end. Because § 1409(a)(4) adds little to the work that § 1409(a)(1) does on its own, it is difficult to say that § 1409(a)(4) “substantially furthers” an important governmental interest. Kirchberg, 450 U.S., at 461.

The Court states that “[t]he second important governmental interest furthered in a substantial manner by § 1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.” The Court again fails to demonstrate that this was Congress' actual purpose in enacting § 1409(a)(4). The majority's focus on "some demonstrated opportunity or potential to develop . . . real, everyday ties" in fact appears to be the type of hypothesized rationale that is insufficient under heightened scrutiny.

The INS asserts the governmental interest of “ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their
United States citizen parent – and thus to the United States – to justify the conferral of citizenship upon them.” Brief for Respondent 11. The majority's asserted end, at best, is a simultaneously watered-down and beefed-up version of this interest asserted by the INS. The majority's rendition is weaker than the INS' in that it emphasizes the “opportunity or potential to develop” a relationship rather than the actual relationship about which the INS claims Congress was concerned. The majority's version is also stronger in that it goes past the formal relationship apparently desired by the INS to “real, everyday ties.”

Assuming, as the majority does, that Congress was actually concerned about ensuring a “demonstrated opportunity” for a relationship, it is questionable whether such an opportunity qualifies as an “important” governmental interest apart from the existence of an actual relationship. By focusing on “opportunity” rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how, in this citizenship-conferral context, anyone profits from a “demonstrated opportunity” for a relationship in the absence of the fruition of an actual tie. Children who have an “opportunity” for such a tie with a parent, of course, may never develop an actual relationship with that parent. See Miller, 523 U.S., at 440 (opinion of Stevens, J.). If a child grows up in a foreign country without any postbirth contact with the citizen parent, then the child's never-realized “opportunity” for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child. Likewise, where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship . . . .

Accepting for the moment the majority's focus on “opportunity,” the attempt to justify § 1409(a)(4) in these terms is still deficient. Even if it is important “to require that an opportunity for a parent-child relationship occur during the formative years of the child's minority,” it is difficult to see how the requirement that proof of such opportunity be obtained before the child turns 18 substantially furthers the asserted interest. As the facts of this case demonstrate, it is entirely possible that a father and child will have the opportunity to develop a relationship and in fact will develop a relationship without obtaining the proof of the opportunity during the child's minority. After his parents' relationship had ended, petitioner Nguyen lived with the family of his father's new girlfriend. In 1975, before his sixth birthday, Nguyen came to the United States, where he was reared by his father, petitioner Boulais. In 1997, a DNA test showed a 99.98% probability of paternity, and, in 1998, Boulais obtained an order of parentage from a Texas court.

Further underscoring the gap between the discriminatory means and the asserted end is the possibility that “a child might obtain an adjudication of paternity ‘absent any affirmative act by the father, and perhaps even over his express objection.”’ Miller, 523 U.S., at 486 (Breyer, J., dissenting) (quoting id., at 434 (opinion of Stevens, J.)). The fact that the means-end fit can break down so readily in theory, and not just in practice, is hardly characteristic of a “substantial” means-end relationship.

Section 1409 was first enacted as § 205 of the Nationality Act of 1940, 54 Stat. 1139-1140. The 1940 Act had been proposed by the President, forwarding a report by a specially convened Committee of Advisors, including the Attorney General. The Committee explained to Congress the
rationale for § 205, whose sex-based classification remains in effect today: “[T]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling is based . . . on the ground that the mother in such case stands in the place of the father. . . . [U]nder American law the mother has a right to custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian. This rule seems to be in accord with the old Roman law and with the laws of Spain and France.” To Revise and Codify the Nationality Laws of the United States, Hearings on H.R. 6127 before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 431 (1945) (reprinting Message from the President, Nationality Laws of the United States (1938)) (emphasis added and internal quotation marks and citations omitted).

Section 1409(a)(4) is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Under this law, as one advocate explained to Congress in a 1932 plea for a sex-neutral citizenship law, “when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background.” Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, Hearing on H.R. 5489 before the House Committee on Immigration and Naturalization, 72d Cong., 1st Sess., 3 (testimony of Burnita Shelton Matthews); see also id., at 5 (citizenship law “permit[s] [father] to escape the burdens incident to illegitimate parenthood”). Unlike § 1409(a)(4), our States’ child custody and support laws no longer assume that mothers alone are “bound” to serve as “natural guardians” of nonmarital children. See, e.g., Ariz. Rev. Stat. Ann. § 25-501 (1999) (equal duties of support); cf. Cal. Civ. Code Ann. § 4600 (West 1972) (abolishing “tender years” doctrine). The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the “very stereotype the law condemns,” J.E.B., 511 U.S., at 138 (internal quotation marks omitted).

Similar to 

Nguyen v. INS, in Flores-Villar v. United States, the Court affirmed a section of the Immigration and Nationality Act imposing a 5-year residency requirement after age of 14 on U.S. citizen fathers, but only 1 year for citizen mothers, before they can transmit citizenship to child born out-of-wedlock abroad to non-U.S. citizen. But see Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (differential treatment violates intermediate review; not justified by stereotypical view that unwed citizen fathers care less about, or have less contact with, their children than unwed mothers, abrogating Flores-Villar; harsher 5-year requirement should be applied to both unwed father and mother until Congress passes gender neutral provision). Intermediate review was again appropriate for a classification discriminating on both gender and illegitimacy grounds. If government action were to involve both racial and gender discrimination, the gender discrimination aspect of the statute would be tested by intermediate review, while the race discrimination aspect would be tested by strict scrutiny. Similar splitting the analysis would apply to other cases of multiple discrimination.

34 131 S. Ct. 2312 (2011) (per curiam) (4-4 decision; Kagan, J., took no part in the consideration or decision), affirming, 536 F.3d 990 (9th Cir. 2008).
§ 23.4  Classifications Triggering Only Minimum Rationality Review

1. Classifications Involving Age: Children or the Elderly

The Court has consistently rejected heightened scrutiny for cases involving the aged or for children. Using the factors discussed at § 23.1 nn.1-4, this conclusion can be supported by noting that neither the aged or children were among the original focus of the framers and ratifiers to protect; that the aged are not a discrete and insular minority groups without either direct ability to vote and participate in the political process, or, for children, parents who will protect their interests as surrogates; that there does not exist a strong or sustained pattern of discrimination based upon false stereotypes not truly indicative of their abilities; and that concerns about scrutinizing legislative judgment and opening a Pandora’s box all outweigh any argument of heightened scrutiny based on the status not really being the product of individual choice. In addition, the Court has often noted that states have great “latitude to regulate the conduct of children,” in part because the law has regarded minors “as having a lesser capacity for making important decisions.”

Despite this standard analysis, occasionally a case of children being punished for something not the product of their choice can trigger intermediate review. For example, in *Lewis v. Thompson*, the Court of Appeals for the Second Circuit considered part of the Welfare Reform Act of 1996 that denied for the first year after birth automatic eligibility to Medicaid benefits for citizen children of illegal alien mothers equivalent to the automatic eligibility extended to the citizen children of citizen mothers. The plaintiffs contended that the intermediate scrutiny applied in *Plyler* was appropriate because the discriminatory denial of automatic eligibility was imposed on the citizen children solely because of the unqualified alien status of their mothers. The Court agreed, noting, “[T]he circumstances in *Plyler*, which the Court has never since invoked to invalidate a statute, presented a more compelling case for heightened scrutiny than does the Plaintiffs' claim for automatic eligibility, because the denial there – public education – is more burdensome than the brief postponement [one year] of obtaining Medicaid coverage (serious as that might be in some circumstances). On the other hand, the Plaintiffs' claim is stronger in that here it is asserted on behalf of citizen children, whereas the claimants in *Plyler* were alien children.” Perhaps more simply, intermediate scrutiny was appropriate in *Lewis* because, as stated in *Plyler*, “[I]mposing disabilities on the . . . child [in these circumstances] is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”

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Massachusetts Board of Retirement v. Murgia
427 U.S. 307 (1976)

Per Curiam

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26(3)(a) (1969), that a uniformed state police officer “shall be retired . . . upon his attaining age fifty,” denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.

Appellee Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. The Massachusetts Board of Retirement retired him upon his 50th birthday. [Ed.: The Age Discrimination in Employment Act of 1967, which prohibits employment discrimination against persons 40 years or age or older, did not apply, given its exception for state police and firefighters.]

The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel. As the District Court observed, “service in this branch is, or can be, arduous.” 376 F.Supp., at 754. “[H]igh versatility is required, with few, if any, backwaters available for the partially superannuated.” Ibid.

These considerations prompt the requirement that uniformed state officers pass a comprehensive physical examination biennially until age 40. After that, until mandatory retirement at age 50, uniformed officers must pass annually a more rigorous examination, including an electrocardiogram and tests for gastro-intestinal bleeding. Appellee Murgia had passed such an examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.

This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. See Lindsey v. Normet, 405 U.S. 56, 73 (1972) [Ed.: no fundamental right to decent, safe, and sanitary housing]; Dandridge v. Williams, 397 U.S. 471, 485 (1970) [Ed.: no fundamental right to public welfare assistance]. Accordingly, we have expressly stated that a standard less than strict scrutiny “has consistently been applied to state legislation restricting the availability of employment opportunities.” Ibid.

Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. Rodriguez, 411 U.S. 1, 28 (1973), observed that a suspect class is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the
Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a “discrete and insular” group, United States v. Carolene Products Co., 304 U.S. 144, 152-153, n.4 (1938), in need of “extraordinary protection from the majoritarian political process.” Instead, it marks a stage that each of us will reach if we live out our normal span.

In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally furthers the purpose identified by the State: Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective. There is no indication that § 26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” Dandridge v. Williams, 397 U.S., at 485.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute. But “[w]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be revised.” Id., at 487. We decide only that the system enacted by [Massachusetts] does not deny appellee equal protection of the laws.

Justice STEVENS took no part in the consideration or decision of this case.

Justice MARSHALL, dissenting.

Today the Court holds that it is permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proved medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated involuntarily “retired” because they have reached the age of 50. Although we have called the right to work “of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure,” Truax v. Raich, 239 U.S. 33, 41 (1915), the Court finds that the right to work is not a fundamental right. And, while agreeing that “the treatment of the aged in this Nation has not been wholly free of discrimination,” the Court holds that the elderly are not a suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation not to be “wholly unrelated” to its objective . . . I respectfully dissent.
While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health and life expectancy of the retired person, and these consequences of termination for age are not disputed by appellants. Thus, an older person deprived of his job by the government loses not only his right to earn a living, but, too often, his health as well, in sad contradiction of Browning's promise: “The best is yet to be,/The last of life, for which the first was made.”

Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and “quasi-suspect” classes such as women or illegitimates. The elderly are protected not only by certain anti-discrimination legislation, but by legislation that provides them with positive benefits not enjoyed by the public at large. Moreover, the elderly are not isolated in society, and discrimination against them is not pervasive but is centered primarily in employment. . . . [W]hen legislation denies them . . . employment I conclude that to sustain the legislation appellants must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest. Cf. San Antonio School District v. Rodriguez, 411 U.S. at 124-126 (Marshall, J., dissenting). This inquiry, ultimately, is not markedly different from that undertaken by the Court in Reed v. Reed, 404 U.S. 71 (1971).

Turning, then, to appellants' arguments, I agree that the purpose of the mandatory retirement law is legitimate, and indeed compelling, the Commonwealth has every reason to assure that its state police officers are of sufficient physical strength and health to perform their jobs. In my view, however, the means chosen, the forced retirement of officers at age 50, is so over-inclusive that it must fall. All potential officers must pass a rigorous physical examination. Until age 40, this same examination must be passed every two years when the officer re-enlists and, after age 40, every year. Appellants have conceded that “[w]hen a member passes his re-enlistment or annual physical, he is found to be qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police.” App. 43. See id., 52. If a member fails the examination, he is immediately terminated or refused re-enlistment. Thus, the only members of the state police still on the force at age 50 are those who have been determined repeatedly by the Commonwealth to be physically fit for the job. Yet, all of these physically fit officers are automatically terminated at age 50. Appellants do not seriously assert that their testing is no longer effective at age, nor do they claim that continued testing would serve no purpose because officers over 50 are no longer physically able to perform their jobs. Thus the Commonwealth is in the position of already individually testing its police officers for physical fitness, conceding that such testing is adequate . . . , and conceding that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.
2. Classifications Involving Physical or Mental Disabilities

Cases involving physical or mental disability also trigger minimum rationality review. As the Court noted in *City of Cleburne v. Cleburne Living Center*, excerpted at § 23.1, even though mental retardation is not the product of the individual’s choice, and often is an immutable characteristic, many factors support applying minimum rationality review to classifications disadvantaging the mentally retarded. They include the ability of courts to scrutinize legislative decisions regarding the disabled, a “difficult and often technical matter, very much a task for legislators guided by qualified professionals”; the lack of recent history of legislative discrimination against the disabled; the fact that such groups are not political powerless as demonstrated by effective lobbying groups on their behalf; and a concern with opening up a Pandora’s box where the aging, the infirm, and individuals at various levels of mental or physical disability would all claim grounds for heightened scrutiny.

In *Heller v. Doe*, a 5-4 Court held under minimum rationality review that Kentucky could authorize involuntary civil commitment of “mentally retarded” persons on a clear and convincing standard of proof, even though proof beyond a reasonable doubt was used for involuntary commitment of “mentally ill” persons. Justice Kennedy said the state could find that mental retardation is easier to diagnose, and dangerousness to self or others is established more easily, than for mental illness, since mental retardation is a relatively stable condition. Thus, a higher standard of proof was not necessary to reduce the risk of error. Further, the usual treatment for mental retardation, attempting to encourage self-care and self-sufficiency, is less invasive than treatment for mentally ill persons, and thus the deprivation was less serious. In dissent, Justices Blackmun, Stevens, O’Connor, and Souter concluded that the distinction was irrational. They stated, “While difficulty of proof, and of interpretation of evidence, could legitimately counsel against setting the standard so high that the State may be unable to satisfy it . . . , that would at most justify a lower standard in the allegedly more difficult cases of illness, not in the easier cases of retardation. We do not lower burdens of proof merely because it is easy to prove the proposition at issue, nor do we raise them merely because it is difficult. Nor do any other reasonably conceivable facts cut in favor of the distinction in . . . the Kentucky statute. Both the ill and the retarded may be dangerous, each may require care, and the State’s interest is seemingly of equal strength in each category.” Regarding how invasive is the treatment, the dissent noted there was no evidence that “the same invasive mind-altering medication prescribed for mental illness is not also used in responding to mental retardation.”

There is even a weaker case for heightened scrutiny for physical disability classifications, than for mental disability, given the greater capabilities of persons with physical disabilities to participate more fully in the political process, and given the history of recent legislation, like the Americans with Disabilities Act of 1990, which is particularly responsive to the concerns of persons with physical disabilities.

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38 509 U.S. 312, 319-28 (1993); *id.* at 335-46 (Souter, J., joined by Blackmun & Stevens, JJ, and O’Connor, J., in part, dissenting).
3. Classifications Involving Sexual Orientation

Classifications involving sexual orientation currently trigger only minimum rationality review. This is true despite arguments that could be made regarding a history of discriminatory legislation based upon false stereotypes, and the fact the sexual orientation increasingly appears to be not merely a lifestyle preference, but a substantially immutable characteristic determined predominantly by genetics and hormonal influences, and not the product of individual choice. Under state constitutions, some state supreme courts have ruled that sexual orientation discrimination is a suspect class, triggering heightened scrutiny. One could also make the argument that, as a practical matter, discrimination based upon sexual orientation draws distinctions based upon sex, and thus should trigger intermediate review as a form of gender discrimination. Despite such arguments, the Supreme Court, and thus lower federal courts, have treated cases of sexual orientation discrimination under the United States Constitution as involving only minimum rationality review.

Despite applying such minimum rationality review, the Supreme Court has found some statutes discriminating on the basis of sexual orientation to be unconstitutional, as in Romer v. Evans, excerpted at § 19.2, on grounds that the only conceivable interest supporting the statute was illegitimate animus towards persons based upon sexual orientation. In a case involving a public


42 See generally Equality Foundation of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); National Gay Task Force v. Board of Educ. of City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984). In 1988, a Ninth Circuit panel did apply strict scrutiny to the Army’s policy of discrimination based upon sexual orientation in Watkins v. United States, 847 F.2d 1329 (9th Cir. 1988), but on en banc review the case was resolved on grounds of equitable estoppel preventing the government from failing to reenlist the individual in the case, 875 F.2d 699 (9th Cir. 1989). Since Watkins, the Ninth Circuit has applied minimum rationality review in these kind of cases. See, e.g., High Tech Gays v. Defense Indus. Security Clearance Office, 895 F.2d 563 (9th Cir. 1990).

school teacher's claim of sexual orientation discrimination when his teaching contract was not renewed, a federal district court in Ohio cited to  Romer for the proposition that actions based solely on animus violated equal protection rights and found in favor of the teacher.44 Similarly, in a case involving a teacher's challenge to her removal as a volleyball coach and restraints on her speech, a federal district court in Utah held that the only justification for the action was bias against the teacher's homosexuality.45

Regarding the issue of the constitutionality of same-sex marriage, courts have split on whether bans on same-sex marriage can satisfy rational review. Prior to 2006, state courts in Vermont and Massachusetts ruled such bans irrational.46 In contrast, in 2006, the New York Court of Appeals failed to strike down the New York State ban on gay marriage in a 4-2 vote, and the Washington Supreme Court failed to strike down the Washington State ban by a closer 5-4 vote. In both cases, the controlling plurality of judges upheld the ban on the grounds that under deferential minimum rational review limiting marriage to heterosexual couples was rationally related to a legitimate state interest in fostering the raising of children in stable, heterosexual families.47

This conclusion is perhaps supported by the first and second prongs of minimum rationality review. Under the first prong, the argument would be that heterosexual couples on average will do a better job of raising children than homosexual couples. This is an empirically dubious proposition, but perhaps one the legislature is entitled to make under deferential minimum rational review, so that the end is legitimate, and not the product of “animus” toward gays and lesbians. Under the second prong, the statute’s ban on who can get married would not be irrationally underinclusive, because it would then be rationally related to achieving that legitimate benefit. However, this analysis fails to consider the third prong of minimum rationality review—whether the statute is irrationally overinclusive because it imposes an irrational burden on individuals. The dissents in the New York and Washington cases chastised the majorities for failing to consider this aspect of rational basis scrutiny.48

46 Baker v. Vermont, 744 A.2d 864, 886-87 (Vt. 1999) (under rational basis review, violation of equal protection to deny same-sex couples the right to marry or enter into civil unions); Goodridge v. Department of Public Health, 798 N.E.2d 941, 961 (Mass. 2003) (under rational basis review, violation of equal protection to deny same-sex couples the right to marry).
Given the state’s alleged interest in fostering the raising of children in stable, heterosexual families, banning gays and lesbians from getting married is an irrational burden, unless one believes that such a ban will either (1) convince some gays and lesbians to change their sexual orientation, enter into heterosexual marriages, and raise children in that context, or (2) reduce the number of children that gay or lesbian couples might otherwise raise if they had the protection of marriage. Otherwise, the ban is not related at all to an interest in raising children in heterosexual marriages. As such, the ban is not only unconstitutional under the third prong of minimum rationality review, but suggestive that the ban is the product of “animus” toward gays and lesbians, particularly since promising to raise children in a stable family is not a requirement before heterosexual couples can get married, nor part of standard marriage vows, which focus on the relationship between the parties toward each other. From this perspective, the views of a majority of judges in the New York and Washington cases are best understood as being driven by a formalist focus on customs and traditions banning gay marriage, or Holmesian deference to the legislative process, rather than a natural law reasoned elaboration of the requirements of minimum rationality review and instrumentalist social policy.49

Since 2006, state courts in Connecticut, Iowa, and New Jersey have required states either to adopt civil union, or grant equal same-sex marriage rights, under state constitutional provisions.50 In “In re Marriage Cases” (six consolidated cases),51 the California Supreme Court held on May 15, 2008 that a California statute barring homosexual marriage violated the Equal Protection Clause of the California Constitution. In November, 2008, a Referendum proposition – Proposition 8 – was put on the ballot to amend the California Constitution to restrict “marriage” to a man and a woman. Proposition 8 passed by a 52-48% vote.

49 Hernandez v. Robles, 7 N.Y.3d 338, 855 N.E.2d 1 (N.Y. 2006) (Holmesian plurality opinion of R.S. Smith, J., joined by G.B. Smith & Read, JJ., emphasizing deference to the legislative branch); id. (Graffeo, J., joined by G.B. Smith, J., concurring in the judgment) (formalist focus on customs and traditions); Andersen v. King County, 138 P.3d 963 (Wash. 2006) (Holmesian plurality opinion of Madsen, J., joined by Alexander, C.J., and C. Johnson, J., emphasizing deference to the legislative branch); id. (J.M. Johnson, J., joined by Sanders, J., concurring in the judgment) (formalist focus on customs and traditions).

50 Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (7-0 opinion, with 4 Justices requiring New Jersey to adopt a civil union law, and three Justices requiring same-sex marriage); Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008) (same-sex marriage); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (same-sex marriage) (three of the Iowa Supreme Court Justices lost their retention elections in November 2010, based on a campaign against their ruling in this case).

51 183 P.3d 384 (Cal. 2008). Proposition 8 was upheld as valid by the California Supreme Court on May 26, 2009 in Strauss v. Horton, 207 P.3d 48 (2009). That decision, however, provided that any same-sex marriages held between May 15, 2008 and November 4, 2008 were nonetheless valid. Even after Strauss, California still permitted same-sex couples to enter into domestic partnerships, as it did before In re Marriage Cases and Strauss.
On August 4, 2010, a federal district judge in California held in *Perry v. Schwarzenegger* that Proposition 8 was unconstitutional as a denial of Equal Protection and Due Process under the 14th Amendment of the United States Constitution. In so ruling, the district court judge held Proposition 8 was not rationally related to any legitimate interest, including the best interest of children, finding there was no rational support for the proposition that permitting same-sex marriage would harm children. Thus, the judge found Proposition 8 was based on nothing other than animus toward gays and lesbians, and thus unconstitutional under *Romer v. Evans*. The Governor and Attorney General of California acquiesced in this ruling. In *Hollingsworth v. Perry*, a 5-4 Court held that proponents of California Proposition 8 did not have standing to appeal the district court’s order. The practical result of this decision was that the district court’s striking down of Proposition 8 was upheld, and therefore same-sex marriage became lawful in California.

Since 2008, a number of states have moved to ratify same-sex marriage by statute. In 2009, Vermont, New Hampshire, and Maine all passed statutes approving of same-sex marriage in their states. Vermont had previously recognized civil unions. A referendum in Maine, however, overturned that state’s recognition of same-sex marriage. On March 3, 2010, the District of Columbia’s statute recognizing same-sex marriage took effect. On July 24, 2011, same-sex marriage became legal in New York, doubling the number of individuals living in states recognizing same-sex marriage. On February 13, 2012, the Governor of Washington state signed a same-sex marriage bill, but that law was subject of a referendum in November 2012. On March 1, 2012, the Governor of Maryland signed a same-sex marriage bill, but that law was also be the subject of a referendum in November 2012. Maine also conducted a new referendum to seek approval of same-sex marriage in November 2012. All three of these referenda approved same-sex marriage in the November 2012 elections. During 2013, Delaware, Minnesota, and Rhode Island also passed statutes permitting same-sex marriage in their states. Thus, as of August 2013, 13 states, representing roughly 30% of the United States population, recognized same-sex marriage (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington), as well as the District of Columbia. Four states recognized civil unions (Colorado, Hawaii, Illinois, and New Jersey) and three states recognize domestic partnerships (Nevada, Oregon, and Wisconsin). Each of these 7 states, representing roughly 13% of the United States population, were the next best candidates to legalize same-sex marriage. By July 2014, four of these states – Hawaii, Illinois, New Jersey, and Oregon – had recognized same-sex marriage either by legislative action or court decree, as did New Mexico by state Supreme Court decree, and Pennsylvania by federal court action. As of July 2014, 19 states recognized same-sex marriage; 3 states recognized civil unions or domestic partnerships; 19 states banned same-sex and other kinds of same-sex unions by constitutional provision; 6 states banned same-sex marriage alone by constitutional provision; and 3 states banned same-sex marriage by statute. On June 26, 2015, the Court extended the fundamental right to marry to same-sex couples in *Obergefell v. Hodges*, discussed at § 25.4.1, requiring all states to recognize same-sex marriage.

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52 704 F. Supp. 2d 921 (N.D. Cal. 2010).

The trend supporting gay marriage is reflected in practice around the world. Between 2006-2010, South Africa, Norway, Sweden, and Argentina joined Belgium, Canada, the Netherlands, and Spain as countries permitting same-sex marriage, and the Mexico Supreme Court said same-sex marriages performed in the state of Mexico City must be given effect by all other states in Mexico. As of August 2013, Brazil, Denmark, France, Iceland, New Zealand, Portugal, and Uruguay, also recognized same-sex marriage, as did Scotland in 2014; England, Wales, Ireland, and Luxembourg in 2015; and Colombia in 2016. Finland and Germany approved same-sex marriage in 2017. A number of other countries recognize civil union or registered partnership arrangements, including Andorra, Australia, Austria, Chile, Croatia, Czech Republic, Ecuador, Greece, Hungary, Italy, Japan, Ireland, Israel, Liechtenstein, Malta, Northern Ireland, Slovenia, Switzerland, and Taiwan.54

Prior to Obergefell, discussed at § 25.4.1, issues surrounding parental rights and custody decisions reflected a split in approaches. For example, Vermont granted full parental rights to both same-sex partners when one of them has conceived by artificial insemination. In Maryland, the correct standard to be applied in visitation determinations involving the presence of a same-sex partner was the same best interests of the child standard applicable to the presence of an opposite-sex nonmarital partner, with liberal visitation being restricted only upon a showing of actual or potential adverse impact to child resulting from contact with the nonmarital partner.55 In contrast, an Indiana Court of Appeals upheld an order precluding the father’s overnight visitation with his children if his same-sex partner was also in house overnight, and prohibited the father from taking his children to activities promoting the homosexual lifestyle. In another case, rather than granting full parental rights, as did the Vermont court, the Supreme Court of Indiana remanded a case to the district court to consider whether both women involved in a domestic relationship were legal parents of the child, where one of them conceived a child though artificial insemination with donor sperm (in the particular case from the other domestic partner’s brother).56 After Obergefell, in V.L. v. E.L., 136 S. Ct. 1017 (2016), the Alabama Supreme Court was required to give full faith and credit to adoption order issued by Georgia superior court to female partner of the children’s biological mother.

By 2017, no state bans adoption purely on grounds of sexual orientation. In 2008, one of the last such bans on adoption was struck down by a Florida district court in In re Adoption of Doe.57 The

54 See generally Same-Sex Marriage Around the World, Encyclopedia Britannica (at www.britannica.com).


57 2008 WL 5006172 (Fla. Cir. Ct. 2008) (while evidence in 2004 was not enough to conclude the ban was irrational in the 11th Circuit decision in Lofton, evidence by 2008 showed ban irrational, and thus unconstitutional, under the Florida Constitution) (not reported in So. 2d), distinguishing Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004).
As an additional aspect of this doctrine, there is the issue of whether under the Full Faith and Credit Clause states that do not recognize same-sex marriages or civil unions in their states will be required to recognize valid same-sex marriages or civil union in those states which do recognize them, as discussed at § 14.1.2(D). The federal Defense of Marriage Act of 1996 (DOMA), dealing with the obligation to recognize same-sex marriages, provided: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” In 2005, a federal district court in Florida held that the law did not to violate full faith and credit, due process, or equal protection principles. In contrast, a federal district court in Massachusetts held in 2010 that the provision in DOMA defining “marriage” for the purposes of federal law, including federal benefits, to include only one man and one woman was unconstitutional. On February 23, 2011, the Obama Administration announced that it would no longer oppose court challenges to DOMA, but would continue to enforce the statute.

As excerpted next, in 2013, in United States v. Windsor, a 5-4 Court held that DOMA’s provision defining marriage as only between one man and one woman was unconstitutional.

58 Campaign for Southern Equality v. Mississippi Dep’t of Human Servs., 2016 WL 1306202 (S.D. Miss. 2016) (Mississippi ban unconstitutional after Obergefell, discussed at § 25.4.1); Stewart v. Heineman, 892 N.W.2d 542 (Neb. 2017) (ban on gays or lesbian individuals or couples adopting children or becoming foster parents unconstitutional). Bans on adoption by unmarried couples, in the states where they exist, are also likely to be declared unconstitutional, when challenged. See, e.g., Arkansas Dept. of Human Services v. Cole, 380 S.W.3d 429 (Ark. 2011) (ban unconstitutional under Arkansas Constitution). To continue discrimination, some states (Alabama, Michigan, Mississippi, North Dakota, South Dakota, Texas, and Virginia, as of July 2017) have recently responded by passing statutes permitting private adoption agencies to refuse to place children into adoptive or foster homes on religious grounds, seemingly motivated by fundamentalist religious disapproval of same-sex individuals and couples. See Movement Advancement Project, Foster and Adoption Laws, www.lgbtmap.org/equality-maps/foster_and_adoption_laws. These laws will likely be challenged in court. Cf. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017) (absent specific, concrete harm, plaintiff’s generalized grievance about possible applications of religious exemption statute not sufficient to grant standing).


United States v. Windsor
133 S. Ct. 2675 (2013)

Justice KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. . . .

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO-04-353R, 2004).

Against th[e] background of lawful same-sex marriage in some States [Ed.: 12 states at the time of this lawsuit], the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States. Yet it is . . . established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. Hillman v. Maretta, 133 S.Ct. 1943 (2013). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See McCulloch v. Maryland, 4 Wheat. 316, 421 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue. [Ed. – Other precedents involve federal refusal to recognize state law marriages if done for purpose of procuring an alien’s admission as an immigrant and spouses in common-law marriages get Social Security benefits without regard to whether state law recognizes common-law marriage.]
Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See Williams v. North Carolina, 317 U.S. 287, 298 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders”). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” Ibid. “[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.” Haddock v. Haddock, 201 U.S. 562, 575 (1906) . . .

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In De Sylva v. Ballentine, 351 U.S. 570 (1956), for example, the Court held that, “[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin,” under the Copyright Act “requires a reference to the law of the State which created those legal relationships” because “there is no federal law of domestic relations.” Id., at 580. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of “the virtually exclusive primacy . . . of the States in the regulation of domestic relations.” Id., at 714 (Blackmun, J., concurring in judgment).

. . . . DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; Bolling v. Sharpe, 347 U.S. 497 (1954). The Constitution's guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. Department of Agriculture v. Moreno, 413 U.S. 528, 534-535 (1973). In determining whether a law is motivated by an improper animus or purpose, “‘[d]iscriminations of an unusual character’” especially require careful consideration. Supra, at 2692 (quoting Romer, 517 U.S., at 633). DOMA cannot survive under these principles.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the ‘Defense of Marriage Act.’ The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” H.R.Rep. No.
DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. See 20 U.S.C. § 1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from “participat[ing] personally and substantially” in matters as to which they or their spouses have a financial interest. 18 U.S.C. § 208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see 2 U.S.C. § 31–2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U.S.C. App. §§ 102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See Bolling, 347 U.S., at 499-500; Adarand Constructors, Inc. v. Penã, 515 U.S. 200, 217-218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. . . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as . . . less respected than others, the federal statute is [unconstitutional].

Chief Justice ROBERTS, dissenting.

I agree with Justice Scalia that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute . . ., I also agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and
the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their “historic and essential authority to define the marital relation,” may continue to utilize the traditional definition of marriage.

Justice SCALIA, with whom Justice THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

I

[Ed.: In Part I, Justice Scalia concluded that no party had standing, discussed at § 3.4.4 n.100]

II

The majority concludes that the only motive for this Act was the “bare . . . desire to harm a politically unpopular group.” Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987) [Ed.: Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act unconstitutional because its purpose was to promote a particular religious belief], but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite – affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the “arguments put forward” by the Act's defenders, and does not even trouble to paraphrase or describe them. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as they see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, e.g., Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 Stan. L. Rev. 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not “recognize as valid any marriage of parties of the same sex.” Ala. Code § 30-1-19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, which State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See Godfrey v. Spano, 920 N.E.2d 328 (2009). DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only opposite-sex spouses – those being the only sort that
were recognized in any State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus – just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such . . . revising judgments upon due deliberation. See, e.g., Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515. . . .

The penultimate sentence of the majority's opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages made lawful by the State.” I have heard such “bald, unreasoned disclaimer[s]” before. Lawrence, 539 U.S., at 604 [(2003)]. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Id., at 578. Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects . . . .” It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here – when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with the Chief Justice's view that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples – or even that this Court could theoretically do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by “‘bare . . . desire to harm’” couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

Justice ALITO, with whom Justice THOMAS joins as to Parts II and III, dissenting.

III

By asking the Court to strike down DOMA . . ., Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG [Ed.: Bipartisan Legal Advisory Group, the legal representative for the House of Representatives] notes that virtually every culture, including many
not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing Hernandez v. Robles, 855 N.E.2d 1, 8 (2006) (“Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex”)). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44-46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, e.g., Girgis, Anderson, & George, What is Marriage? Man and Woman: A Defense, at 23-28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment – marked by strong emotional attachment and sexual attraction – between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from . . . marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned.

In the aftermath of Windsor, same-sex marriage bans were challenged in every state, and a number of lower federal courts and state courts ruled such bans unconstitutional, but most of these decisions were stayed pending appeal, although not in Oregon or Pennsylvania. Once a circuit split emerged, with the Sixth Circuit upholding state bans on same-sex marriage, the Supreme Court granted certiorari, and in a 5-4 decision struck down all bans on same-sex marriage nationwide. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Consistent with the result in Windsor, the same 5-4 majority in Obergefell ruled bans on same-sex marriage are unconstitutional, although, as discussed at § 25.4.1 n.22, on the ground that there is a fundamental right of same-sex couples to marry, just as there was a fundamental right of interracial couples to marry in Loving v. Virginia. Without regard to a fundamental rights analysis, the 5-4 majority in Windsor struck down DOMA on the ground that it reflected animus toward gays and lesbians, and thus was not sufficiently supported by legitimate interests, which meant it failed even minimum rationality review.

The decision in Obergefell renders moot the issue whether individuals legally married in one state, who move to another state which does not recognize same-sex marriage, should be treated as still
validly married for purposes of federal or state marriage benefits and burdens (i.e., following the law of the state where the marriage “celebration” took place), or as unmarried (i.e., following the law of the place where the parties are “domiciled”). Prior to Obergefell, in February 2014, Attorney General Eric Holder said same-sex rights would be allowed under any federal law as long as the parties were married in a state lawfully (place of “celebration”), but many states took the opposite position refusing to recognize in their state valid same-sex marriages from other states.

Additional steps taken by the Obama Administration have improved the legal landscape for gay and lesbian individuals. As reported in the Washington Post, “Gay partners of federal workers will now receive long-term health insurance, access to day care and other benefits. Federal Housing Authority loans can no longer consider the sexual orientation of applicants. The Census Bureau plans to report the number of people who report being in a same-sex relationship. Hospitals must allow gays to visit their ill partners. And federal child-care subsidies can be used by the children of same-sex domestic partners.”61 In addition, Congress passed a bill to repeal the military’s “don’t ask, don’t tell” policy in December, 2010. That Act specified the policy would remain in place until the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certified that repeal would not harm military readiness, followed by a 60-day waiting period. Those certifications were sent on July 22, 2011. The “don’t ask, don’t tell” policy ended on September 20, 2011. The military ended its ban on service by transgendered persons on June 30, 2016, but implementation has been delayed by the Trump Administration and its status is currently in flux. See also Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017) (8-3 en banc) (Title VII of the 1964 Civil Rights Act prohibits sexual orientation discrimination in employment as a form of sex discrimination); Zarda v. Altitude Express, Inc., 883 F.3d 76 (2nd Cir. 2018) (9-4 en banc) (same). But see Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) (discrimination based on sexual orientation not actionable under Title VII).

The Trump Administration has moved to roll back some of the protections of the Obama Administration, such as revoking federal guidelines instructing public schools to allow transgender students to use the bathroom consistent with their gender identity. Some states have passed statutes permitting business to refuse to deal with individuals based on “sincerely held religious beliefs,” which typically would involve disapproval of same-sex individuals and couples, but also could involve discrimination against single mothers who had a child out-of-wedlock. See also Protect Fayetteville f/k/a Repeal 119 v. City of Fayetteville, 510 S.W.3d 258 (Ark. 2017) (striking down local law banning discrimination on a person’s sexual orientation or gender identity as conflicting with 2015 state law which prohibits local communities from passing any measure “that prohibits discrimination on a basis not contained in state law.”). California has passed a statute banning most state-funded travel to states with negative gay-rights provisions (as of June 2017 – Alabama, Kansas, Kentucky, Mississippi, North Carolina, South Dakota, Tennessee, and Texas). On LGBTQ rights generally, see www.lambdalegal.org (website of Lambda Legal Defense and Education Fund).

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4. Classifications Involving Wealth

Despite support from some instrumentalist Justices for heightened scrutiny regarding wealth classifications, during the instrumentalist era the Court rejected heightened scrutiny for cases involving the poor or indigent. As the Court noted in *Harris v. McRae*, “[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.” Justice Harlan provided a good summary of the reasons for this conclusion in his dissent in *Douglas v. California*:

[T]o suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely [is flawed]. Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. . . .

The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

Using the factors discussed at § 23.1 nn.1-4, this conclusion can be supported by noting that wealth classifications were not the original focus of the framers and ratifiers to protect; that the poor are not a discrete and insular minority group without the ability to vote and thus protect their interests in the political process; that there does not exist a strong or sustained pattern of discrimination based upon false stereotypes not truly indicative of their abilities; and that real concerns about second-guessing legislative judgment and opening a Pandora’s box apply in these kind of cases. These reasons can be viewed as outweighing any argument of heightened scrutiny based on the condition of being poor often not really being the product of individual choice.

Despite this doctrine, the Court has applied strict scrutiny to substantial burdens on the poor in the context of exercise of a fundamental right. For example, poll taxes that substantially burden the poor from exercising their fundamental right to vote trigger strict scrutiny, addressed at § 24.2; filing fees or fees for record preparation to permit an appeal trigger strict scrutiny if a substantial burden on the right of access to courts, addressed at § 27.2; and financial burdens on welfare recipients that substantially burden the right to travel trigger strict scrutiny, addressed at § 27.3.

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CHAPTER 24: VOTING RIGHTS AND THE EQUAL PROTECTION CLAUSE

§ 24.1 Voting Rights and the Principle of One Person/One Vote .......................... 1117

§ 24.2 Restrictions on Who is Allowed to Vote .......................................................... 1130

§ 24.3 Regulating Ability to Vote: Voter ID Laws and Other Regulations ............... 1146

§ 24.4 Vote Counting and Recounting Procedures, Including Bush v. Gore ........... 1164

§ 24.1 Voting Rights and the Principle of One Person/One Vote

As the Court noted in Nordlinger v. Hahn,1 discussed at § 19.1 n.10: “[T]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” Heightened scrutiny under either strict scrutiny, for suspect classifications, or intermediate review, for quasi-suspect classifications, has been the subject of Chapters 20-23. In this Chapter, and in Chapters 25-27, the other branch of heightened scrutiny cases – fundamental rights – are addressed.

Where a fundamental right is involved, as opposed to a non-fundamental social or economic right, the Court uses a higher level of scrutiny. After all, something “fundamental” is being taken away, or limited, by the statute, regulation, or other government action. In these cases it is clear that for substantial burdens on fundamental rights, strict scrutiny will be used. This will be clear from the fundamental right to vote cases discussed in this Chapter, as well as the other fundamental right cases, involving Bill of Rights or 14th Amendment rights, addressed in Chapters 25-27.

For less than substantial burdens on fundamental rights, the phraseology used by the Court in various contexts has not always been uniform. In each of these cases, however, including the phraseology used in the voting rights cases, addressed at § 24.3, the standard of review is higher than minimum rationality review, but less than intermediate review. In each case, the burden is on the challenger to prove the government action is unconstitutional. Each case involves the Court examining the extent of the burden on the individual when measured against the extent of the government benefit achieved by the statute. In terms of cases addressed earlier in this Coursebook, this standard thus resembles the kind of scrutiny used by the Court in deciding whether the burden is: “clearly excessive” under the Pike v. Bruce Church test, excerpted at § 13.3.4, for Dormant Commerce Clause review; “grossly excessive” under the BMW v. Gore test, excerpted at § 17.4, for unconstitutionality of punitive damage awards; not “reasonable and necessary” under the U.S. Trust v. New Jersey test, excerpted at § 18.2, in Contract Clause review; or goes “too far” and thus is not “reasonable” under the Penn Central test, excerpted at § 18.3.3, for Takings Clause review.

1 505 U.S. 1, 10 (1992).
Certain members of the Court, and some commentators, have used the phrase “second-order” reasonableness or rational review to describe a level of scrutiny higher than minimum rationality review but less than strict scrutiny.\(^2\) Other members of the Court have referred to “reasonableness” or “proportionality” balancing.\(^3\) Whatever term is used, it would aid predictability for the Court to acknowledge that all the above tests really represent the same level of scrutiny: not the substantial deference to the government of minimum rationality review, but a real balancing of benefits and burdens, with the burden on the challenger to show the regulation is “excessive” or “unreasonable” given any conceivable legitimate interests that can be used to support it. Of course, in those cases where the burden does shift to the government in these balancing tests, like the \textit{Maine v. Taylor} test, excerpted at § 13.3.3, for Dormant Commerce Clause review, or \textit{Dolan v. Tigard}, excerpted at § 18.3.4, for Takings Clause Review, perhaps the term “third-order” reasonableness review would be appropriate for this higher kind of balancing where the government must justify its actions.

Regarding voting rights, the Constitution has no specific section stating that individuals have a right to vote. Article I, § 2 does provide that the “House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” There are constitutional Amendments saying that the right of citizens of the United States to vote cannot be denied based on race (15th Amendment); sex (19th Amendment), and age for citizens of 18 years of age or older (26th Amendment). Provisions in the Constitution regarding how members of Congress or the President are elected, the Article IV guarantee to each State that it shall have a “Republican form of Government,” and even the Preamble’s admonition that it is “We, the People” who “ordain and establish this Constitution for the United States of America,” also support the notion that a right to vote is a “fundamental right” implicit in our democracy. The proposition that there is a “fundamental right to vote” would likely command unanimous support on the Supreme Court today.

In 1964, the Court held in \textit{Reynolds v. Sims}, excerpted below, that under this fundamental right to vote the Equal Protection Clause embodies the principle of “one person/one vote.” Under \textit{Reynolds}, only variations in population size among districts for state house and senate, or federal House of Representatives, that can satisfy the strict scrutiny, least restrictive alternative test are permissible.


\(^3\) \textit{See, e.g.}, District of Columbia v. Heller, 554 U.S. 570, 689-90 (Breyer, J., joined by Stevens, Souter & Ginsburg, dissenting) (“I would simply adopt such an interest-balancing inquiry explicitly. . . . [T]his sort of ‘proportionality’ approach is [not] unprecedented [as] the Court has applied it in various contexts, including election-law cases, speech cases, and due process cases. . . . [In these cases, the court exercises] ‘independent judicial judgment’ in light of the whole record to determine whether a law exceeds constitutional bounds.”).
Reynolds v. Sims
377 U.S. 533 (1964)

Chief Justice WARREN delivered the opinion of the Court.

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under the Equal Protection Clause of the Federal Constitution, the existing and two legislative proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures.

The complaint stated that the Alabama Legislature was composed of a Senate of 35 members and a House of Representatives of 106 members. It set out relevant portions of the 1901 Alabama Constitution, which prescribe the number of members of the two bodies of the State Legislature and the method of apportioning the seats among the State's 67 counties . . . .

Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied “equal suffrage in free and equal elections . . . and the equal protection of the laws” in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution.

On April 14, 1962, the District Court, after reiterating the views expressed in its earlier order, reset the case for hearing on July 16, noting that the importance of the case, together with the necessity for effective action within a limited period of time, required an early announcement of its views. 205 F.Supp. 245. Relying on our decision in Baker v. Carr [Ed.: excerpted in this Coursebook at § 4.3.2], the Court found jurisdiction, justiciability and standing. It stated that it was taking judicial notice of the facts that there had been population changes in Alabama's counties since 1901, that the present representation in the State Legislature was not on a population basis, and that the legislature had never reapportioned its membership as required by the Alabama Constitution.

On July 12, 1962, an extraordinary session of the Alabama Legislature adopted two reapportionment plans to take effect for the 1966 elections. One was a proposed constitutional amendment, referred to as the “67-Senator Amendment.” It provided for a House of Representatives consisting of 106 members, apportioned by giving one seat to each of Alabama's 67 counties and distributing the others according to population by the “equal proportions” method. Using this formula, the constitutional amendment specified the number of representatives allotted to each county until a new apportionment could be made on the basis of the 1970 census. The Senate was to be composed of 67 members, one from each county. The legislation provided that the proposed amendment should be submitted to the voters for ratification at the November 1962 general election.
The other reapportionment plan was embodied in a statutory measure adopted by the legislature and
signed into law by the Alabama Governor, and was referred to as the “Crawford-Webb Act.” It was
enacted as standby legislation to take effect in 1966 if the proposed constitutional amendment should
fail of passage by a majority of the State's voters, or should the federal courts refuse to accept the
proposed amendment (though not rejected by the voters) as effective action in compliance with the
requirements of the Fourteenth Amendment. The act provided for a Senate consisting of 35
members, representing 35 senatorial districts established along county lines, and altered only a few
of the former districts. In apportioning the 106 seats in the Alabama House of Representatives, the
statutory measure gave each county one seat, and apportioned the remaining 39 on a rough
population basis, under a formula requiring increasingly more population for a county to be accorded
additional seats. The Crawford-Webb Act also provided that it would be effective “until the
legislature is reapportioned according to law,” but provided no standards for such a reapportionment.
Future apportionments would presumably be based on the existing provisions of the Alabama
Constitution which the statute, unlike the proposed constitutional amendment, would not affect.

On July 21, 1962, the District Court held that the inequality of the existing representation in the
Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding
which the Court noted had been “generally conceded” by the parties to the litigation, since
population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later,
into an invidiously discriminatory plan completely lacking in rationality. 208 F.Supp. 431. Under
the existing provisions, applying 1960 census figures, only 25.1% of the State's total population
resided in districts represented by a majority of the members of the Senate, and only 25.7% lived
in counties which could elect a majority of the members of the House of Representatives.
Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in
the House. Bullock County, with a population of only 13,462, and Henry County, with a population
of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with
a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had
only seven representatives. With respect to senatorial apportionment, since the pertinent Alabama
constitutional provisions had been consistently construed as prohibiting the giving of more than one
Senate seat to any one county, Jefferson County, with over 600,000 people, was given only one
senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with
only 18,739 people.

The Court then considered both the proposed constitutional amendment and the Crawford-Webb Act
to ascertain whether the legislature had taken effective action to remedy the unconstitutional aspects
of the existing apportionment. In initially summarizing the result which it had reached, the Court
stated: “This Court has reached the conclusion that neither the ‘67-Senator Amendment,’ nor the
‘Crawford-Webb Act’ meets the necessary constitutional requirements. We find that each of the
legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational
that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the
(federal constitutional) test.” 208 F.Supp., at 437.

The Court stated that the apportionment of one senator to each county, under the proposed
constitutional amendment, would “make the discrimination in the Senate even more invidious than
Under the 67-Senator Amendment, as pointed out by the court below, “[t]he present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the State,” the 34 smallest counties, with a total population of less than that of Jefferson County, would have a majority of the senatorial seats, and senators elected by only about 14% of the State's population could prevent the submission to the electorate of any future proposals to amend the State Constitution (since a vote of two-fifths of the members of one house can defeat a proposal to amend the Alabama Constitution). Noting that the “only conceivable rationalization” of the senatorial apportionment scheme is that it was based on equal representation of political subdivisions within the State and is thus analogous to the Federal Senate, the District Court rejected the analogy on the ground that Alabama counties are merely involuntary political units of the State created by statute to aid in the administration of state government. In finding the so-called federal analogy irrelevant, the District Court stated: “The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties.” Id., at 438.

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarbrough, 110 U.S. 651 [(1884) (The Ku-Klux Cases)], and to have their votes counted, United States v. Mosley, 238 U.S. 383 [(1915)]. In Mosley the Court stated that it is “as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.” 238 U.S., at 386. The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347; Lane v. Wilson, 307 U.S. 268, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, nor diluted by ballot-box stuffing, Ex parte Siebold, 100 U.S. 371; United States v. Saylor, 322 U.S. 385. As the Court stated in Classic, “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . .” 313 U.S., at 315. Racially based gerrymandering, Gomillion v. Lightfoot, 364 U.S. 339, and the conducting of white primaries, Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; Smith v. Allwright, 321 U.S. 649; Terry v. Adams, 345 U.S. 461, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

In Gray v. Sanders, 372 U.S. 368 [(1963)], we held that the Georgia county unit system, applicable in statewide primary elections [Ed.: that system involved the winner of the most counties in the state being declared the winner, without regard to the overall popular vote total], was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of
where they resided. After indicating that the Fifteenth and Nineteenth Amendments prohibit a State from over-weighting or diluting votes on the basis of race or sex, we stated: “How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of “[W]e the [P]eople” under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.” 372 U.S., at 379-380. Continuing, we stated that “there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.” And, finally, we concluded: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.” Id., at 381.

We stated in Gray, however, that that case, “unlike Baker v. Carr, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population.” Id., at 376.

Of course, in these cases we are faced with the problem not presented in Gray – that of determining the basic standards and stating the applicable guidelines for implementing our decision in Baker v. Carr.

In Wesberry v. Sanders, 376 U.S. 1 [(1964)], decided earlier this Term, we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjusticiable questions and should not be dismissed generally for “want of equity.” We determined that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.

Gray and Wesberry are of course not dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies. Admittedly, those decisions, in which we held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State, were based on different constitutional considerations and were addressed to rather distinct problems. But neither are they wholly inapposite. Gray, though not determinative here since involving the weighting of votes in statewide elections, established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections.
And our decision in *Wesberry* was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen “by the People,” while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to “the political franchise of voting” as “a fundamental political right, because preservative of all rights.” 118 U.S., at 370.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control over state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. . . . Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. *Brown v. Board of Education*, 347 U.S. 483.

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together “to form a more perfect Union.” But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. In rejecting an asserted analogy to the federal electoral college in *Gray v. Sanders*, supra, we stated: “We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite
its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.” 372 U.S., at 378.

Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161 [(1907)], these governmental units are “created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,” and the “number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.” The relationship of the States to the Federal Government could hardly be less analogous.

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same – population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. [FN: 57. As stated by the Court in Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 [(1931)], “We must remember that the machinery of government would not work if it were not allowed a little play in its joints.”]

In Wesberry v. Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry – equality of population among districts – some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state
legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines [Ed.: such as county lines or city boundaries] to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. . . . Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.

One of the arguments frequently offered as a basis for upholding a State's legislative apportionment arrangement, despite substantial disparities from a population basis in either or both houses, is grounded on congressional approval, incident to admitting States into the Union, of state apportionment plans containing deviations from the equal-population principle. Proponents of this argument contend that congressional approval of such schemes, despite their disparities from population-based representation, indicates that such arrangements are plainly sufficient as establishing a “republican form of government.” As we stated in Baker v. Carr, some questions raised under the Guaranty Clause are nonjusticiable, where “political” in nature and where there is a clear absence of judicially manageable standards. Nevertheless, it is not inconsistent with this view to hold that, despite congressional approval of state legislative apportionment plans at the time of admission into the Union, even though deviating from the equal-population principle here enunciated, the Equal Protection Clause can and does require more. And an apportionment scheme in which both houses are based on population can hardly be considered as failing to satisfy the Guaranty Clause requirement. Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization. In any event, congressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the
States, often honored more in the breach than the observance, however. Illustratively, the Alabama Constitution requires decennial reapportionment, yet the last reapportionment of the Alabama Legislature, when this suit was brought, was in 1901.

History indicates . . . that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

Justice CLARK, concurring in the affirmance.

The Court goes much beyond the necessities of this case in laying down a new “equal population” principle for state legislative apportionment. This principle seems to be an offshoot of Gray v. Sanders, 372 U.S. 368, 381 (1963), i.e., “one person, one vote,” modified by the “nearly as is practicable” admonition of Wesberry v. Sanders, 376 U.S. 1, 8 (1964). [FN*: Incidentally, neither of these cases, upon which the Court bases its opinion, is apposite. Gray involved the use of Georgia's county unit rule in the election of United States Senators and Wesberry was a congressional apportionment case.] Whether “nearly as is practicable” means “one person, one vote” qualified by “approximately equal” or “some deviations” or by the impossibility of “mathematical nicety” is not clear from the majority's use of these vague and meaningless phrases. But whatever the standard, the Court applies it to each house of the State Legislature.

It seems to me that all that the Court need say in this case is that each plan considered by the trial court is “a crazy quilt,” clearly revealing invidious discrimination in each house of the Legislature and therefore violative of the Equal Protection Clause. See my concurring opinion in Baker v. Carr, 369 U.S. 186, 253-258 (1962).

I, therefore, do not reach the question of the so-called “federal analogy.” But in my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State. See my dissenting opinion in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S., [at] 741 [(1954)], decided this date.
Justice STEWART [concurring in the affirmance].

All of the parties have agreed with the District Court's finding that legislative inaction for some 60 years in the face of growth and shifts in population has converted Alabama's legislative apportionment plan enacted in 1901 into one completely lacking in rationality. Accordingly, for the reasons stated in my dissenting opinion in *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S., at 744 [(1954) decided this date], I would affirm the judgment of the District Court holding that this apportionment violated the Equal Protection Clause.

I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as closely as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment.

Mr. Justice HARLAN, dissenting.**

[FN** (This opinion applies also to WMCA, Inc. v. Lomenzo, 377 U.S. 633; Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656; Davis v. Mann, 377 U.S. 678; Roman v. Sincock, 377 U.S. 695; and Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713.)

In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate. These decisions, with *Wesberry v. Sanders*, 376 U.S. 1, involving congressional districting by the States, and *Gray v. Sanders*, 372 U.S. 368, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary.

Had the Court paused to probe more deeply . . . , it would have found that the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before *Baker v. Carr*, supra, made an abrupt break with the past in 1962.

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of “developing” constitutionalism. It is meaningless to speak of constitutional “development” when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, § 4), the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.
Ratification by the “loyal” States. – Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment are not generally available. There is, however, compelling indirect evidence. Of the 23 loyal States which ratified the Amendment before 1870, five had constitutional provisions for apportionment of at least one house of their respective legislatures which wholly disregarded the spread of population. Ten more had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas. Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?

Ratification by the “reconstructed” States. – Each of the 10 “reconstructed” States was required to ratify the Fourteenth Amendment before it was readmitted to the Union. [Ed.: Of the 11 states which seceded, Tennessee had ratified before Congress adopted the requirement, and so not counted here]. The Constitution of each was scrutinized in Congress. Debates over readmission were extensive. In at least one instance, the problem of state legislative apportionment was expressly called to the attention of Congress. Objecting to the inclusion of Florida in the Act of June 25, 1868, Mr. Farnsworth stated on the floor of the House: “I might refer to the apportionment of representatives. By this constitution representatives in the Legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely-populated parts of the State are those where there are very few negroes, the parts inhabited by the white rebels, the men who, coming in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those counties is entitled to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants.” Cong. Globe, 40th Cong., 2d Sess., 3090-3091 (1868).

The response of Mr. Butler is particularly illuminating: “All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House.” Id., at 3092.

The Constitutions of six of the 10 States contained provisions departing substantially from the method of apportionment now held to be required by the Amendment.

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it. . . . The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

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These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional “principle,” and that this Court should “take the lead” in promoting reform when other branches of government fail to act. . . . For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

In practice, the Reynolds doctrine has meant population variations of less than 1% for congressional districts, or less than 10% for state house and senate districts, as long as those variations can be justified based on drawing district lines consistent with such traditional considerations as: existing political boundaries, such as county lines or boundaries of cities; district shape compactness, that is, regular geometric shapes like squares or circles; communities of interest, such as rural versus urban; or geographic barriers, such as rivers or mountains. In Karcher v. Daggett, the Court held that a variation of less than .7% was still unconstitutional if there was no justified reason for the variation. In contrast, in Tennant v. Jefferson County Commission, the Supreme Court held, per curiam, that West Virginia had sufficiently legitimate reasons for adopting its latest congressional redistricting plan, which included not splitting counties, not redistricting incumbents into the same districts, and not requiring dramatic shifts in which sets of voters are in which districts, and that a population variation of .79% was constitutional under Reynolds v. Sims.

See Grant M. Hayden, Resolving the Dilemma of Minority Representation, 92 Cal. L. Rev. 1589, 1596-99 (2004) (state and local districts “allowed to deviate up to 10%” while congressional districts “almost no deviation” allowed); Harris v. Arizona Indep. Redist. Comm’n, 136 S. Ct. 1301 (2016) (since population deviations between the largest and smallest state districts was less than 10%, and thus redistricting not presumptively invalid, challengers failed to show existing deviations were result of illegitimate considerations). But see Mahan v. Howell, 410 U.S. 315 (1973) (variation of 16.4% allowed for state districts when that could be justified and most districts had less than 4% variation); Abate v. Mundt, 403 U.S. 182 (1971) (variation of 11.9% allowed for state districts). Hayden also notes that since the movement to the cities in the 20th century “was driven, in large part, by the migration of rural blacks and the immigration of [Ed.: ethnic] Europeans . . . , voters living in the large and growing urban areas, who were disproportionately members of minority groups, had their votes numerically diluted” under pre-Reynolds districting practices. Hayden, supra, at 1598-99. See generally Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (“based on constitutional history, this Court’s decisions, and longstanding practice,” states and localities can draw legislative districts based on total population, and are not required to use voter population) (Alito, J., joined by Thomas, J. except as to Part III-B, concurring in the judgment) (noting the majority hints, but does not decide, that a state must use total population; thus, although no state currently does it, a state could possibly use voter population in drawing districts of equal population size).


133 S. Ct. 3 (2013).
In most states, state legislatures draft redistricting plans, typically subject to Governor’s veto power. In some states, the state legislature has delegated redistricting to “independent state commissions” in order to minimize political gerrymandering. See generally Justin Levitt, All About Redistricting (http://redistricting.ils.edu) (last visit 2017). In Arizona, the voters imposed on the legislature an “independent commission” through the state referendum process. In Arizona State Legis. v. Arizona Indep. Redistr. Comm’n, 135 S. Ct. 2652 (2015), a 5-4 Court upheld the commission, reasoning the Elections Clause requirement such decisions be “prescribed in each State by the Legislature” meant general legislative processes, of which state referenda are a part. That reading was supported by practice, precedents, and policy arguments about not undermining referendum-inspired laws. The dissent focused on the text of the Elections Clause, which provides the “Legislature” must make the decision, and an imposed referendum process is not legislatively approved. Id. (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting). Cf. Hawke v. Smith, 253 U.S. 221, 229 (1920) (“ratification” different than “legislation”; thus, state legislature has exclusively authority to decide whether to ratify Constitutional amendments, not referenda or Governor veto).

§ 24.2 Restrictions on Who is Allowed to Vote

At the time of the Nation’s founding, many individuals were denied the right to vote, including, in most states, African-Americans, Native Americans, women, minors, and non-property owners. Gradually, the right to vote was extended to all these groups, except for persons under 18 years of age. The 17th Amendment, ratified in 1913, provided for direct election of Senators by the people, rather than by state legislatures, as originally provided for in Article I, § 3. The 24th Amendment, ratified in 1964, provided that no one should be denied the right to vote in federal elections “by reason of failure to pay any poll tax or other tax.” That Amendment did not apply to state elections.

In 1966, in Harper v. Virginia State Board of Elections, Justice Douglas wrote for the Court that a state poll tax was unconstitutional because the right to vote in a free and unimpaired manner is "fundamental." Justice Douglas answered a formalist static Constitution dissent by Justice Black,
which focused on traditions of poll taxes, and a Holmesian deference-to-government dissent by Justices Harlan and Stewart, by saying that notions of what constitutes equal treatment can change over time, citing Brown v. Board of Education’s overruling in 1954 of Plessy v. Ferguson. Justice Douglas stated that where fundamental rights are asserted, classifications must closely scrutinized.

Harper v. Virginia State Board of Elections
383 U.S. 663 (1966)

Justice DOUGLAS delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax. The three-judge District Court, feeling bound by our decision in Breedlove v. Suttles, 302 U.S. 277 [(1937)], dismissed the complaint. See 240 F.Supp. 270. The cases came here on appeal and we noted probable jurisdiction. 380 U.S. 930; 382 U.S. 806.

[FN1. Section 173 of Virginia's Constitution directs the General Assembly to levy an annual poll tax not exceeding $1.50 on every resident of the State 21 years of age and over (with exceptions not relevant here). One dollar of the tax is to be used by state officials “exclusively in aid of the public free schools” and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution includes payment of poll taxes as a precondition for voting. Section 20 provides that a person must “personally” pay all state poll taxes for the three years preceding the year in which he applies for registration. By § 21 the poll tax must be paid at least six months prior to the election in which the voter seeks to vote. Since the time for election of state officials varies (Va. Code §§ 24-136, 24-160, 24-168; id., at § 24-22), the six months' deadline will vary, election from election. The poll tax is often assessed along with the personal property tax. Those who do not pay a personal property tax are not assessed for a poll tax, it being their responsibility to take the initiative and request to be assessed. Va. Code § 58-1163. Enforcement of poll taxes takes the form of disenfranchisement of those who do not pay, § 22 of the Virginia Constitution providing that collection of delinquent poll taxes for a particular year may not be enforced by legal proceedings until the tax for that year has become three years delinquent.]

While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution (United States v. Classic, 313 U.S. 299, 314-315), the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment [Ed.: particularly the freedom of speech and the right to assemble and petition government for grievances]. Cf. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 113. We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage “is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.” Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 51. We were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class. Id., at 53. But the Lassiter case does not govern
the result here, because, unlike a poll tax, the “ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot.” Id., at 51.

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see Pope v. Williams, 193 U.S. 621), we held in *Carrington v. Rash*, 380 U.S. 89, that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services. “By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.” Id., at 96. And see *Louisiana v. United States*, 380 U.S. 145. Previously we had said that neither homesite nor occupation “affords a permissible basis for distinguishing between qualified voters within the State.” *Gray v. Sanders*, 372 U.S. 368, 380. We think the same must be true of requirements of wealth or affluence or payment of a fee.

Recently in *Reynolds v. Sims*, 377 U.S. 533, 561-562 [(1964)], we said, “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” There we were considering charges that voters in one part of the State had greater representation per person in the State Legislature than voters in another part of the State. We concluded: “A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of “government of the people, by the people, [and] for the people.” The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.” Id., at 568.

We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license [FN5: Maine has a poll tax (Maine Rev. Stat. Ann. Tit. 36, § 1381) which is not made a condition of voting; instead, its payment is a condition of obtaining a motor vehicle license (Maine Rev. Stat. Ann. Tit. 29, § 108) or a motor vehicle operator's license. Id., § 584.], it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.
To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context – that is, as a condition of obtaining a ballot – the requirement of fee paying causes an “invidious” discrimination (Skinner v. State of Oklahoma, 316 U.S. 535, 514) that runs afoul of the Equal Protection Clause. Levy “by the poll,” as stated in Breedlove v. Suttles, supra, 302 U.S. at 281, is an old familiar form of taxation; and we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise. Breedlove v. Suttles sanctioned its use as “a prerequisite of voting.” Id., at 283. To that extent the Breedlove case is overruled.

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment “does not enact Mr. Herbert Spencer's Social Statics” ( Lochner v. People of State of New York, 198 U.S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See Malloy v. Hogan, 378 U.S. 1, 5-6 [(1964) [Ed.: Fifth Amendment’s privilege against self-incrimination a fundamental right applicable to the States under the Fourteenth Amendment, despite earlier cases holding the privilege was not fundamental, noted at § 14.3.1(B)-(D)]. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. Plessy v. Ferguson, 163 U.S. 537. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954 – more than a half-century later – we repudiated the “separate-but-equal” doctrine of Plessy as respects public education we stated: “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written.” Brown v. Board of Education, 347 U.S. 483, 492.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, e.g., Skinner v. State of Oklahoma, 316 U.S. 535, 541; Reynolds v. Sims, 377 U.S. 553, 561-562; Carrington v. Rash, supra; Baxstrom v. Herold, 383 U.S. 107; Cox v. State of Louisiana, 379 U.S. 536, 580-581 (Black, J., concurring) [“[T]o deny this appellant and his group use of the streets because of their views on racial discrimination, while allowing other groups to use the streets to voice their opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.”]

Justice BLACK, dissenting.

In Breedlove v. Suttles, 302 U.S. 277, decided December 6, 1937, a few weeks after I took my seat as a member of this Court, we unanimously upheld the right of the State of Georgia to make payment of its state poll tax a prerequisite to voting in state elections. We rejected . . . contentions that the state law violated the Equal Protection Clause of the Fourteenth Amendment because it put an unequal burden on different groups of people according to their age, sex, and ability to pay.
Later, May 28, 1951, I joined the Court's judgment in Butler v. Thompson, 341 U.S. 937, upholding, over the dissent of Mr. Justice Douglas, the Virginia state poll tax law challenged here against the same equal protection challenges. Since the Breedlove and Butler cases were decided the Federal Constitution has not been amended in the only way it could constitutionally have been, that is, as provided in Article V of the Constitution. I would adhere to the holding of those cases. The Court, however, overrules Breedlove in part, but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy. From this action I dissent.

The Court denies that it is using the “natural-law-due-process formula.” It says that its invalidation of the Virginia law “is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.” I find no statement in the Court's opinion, however, which advances even a plausible argument as to why the alleged discriminations which might possibly be effected by Virginia's poll tax law are “irrational,” “unreasonable,” “arbitrary,” or “invidious” or have no relevance to a legitimate policy which the State wishes to adopt. The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government. The Court's failure to give any reasons to show that these purposes of the poll tax are “irrational,” “unreasonable,” “arbitrary,” or “invidious” is a pretty clear indication to me that none exist. . . .

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be “shackled to the political theory of a particular era,” and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightening theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a “political theory” embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

Justice HARLAN, whom Justice STEWART joins, dissenting.

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States with respect to state elections [FN1: Alabama, Mississippi, Texas, and Virginia], is perhaps in itself not of great moment. But that fact that the coup de grace has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal . . . .
The Court applied a similar strict scrutiny approach in *Kramer v. Union Free School District No. 15*, excerpted below. *Kramer* involved a challenge to a New York law that limited who could vote in a school district election to property owners and parents of children in the public schools. In contrast, for less serious burdens on who could vote, as in *Ball v. James*, excerpted below, the Court applied only a reasonableness balancing test to analyze the Arizona law at issue in that case.

**Kramer v. Union Free School District No. 15**  
**395 U.S. 621 (1969)**

Chief Justice WARREN delivered the opinion of the Court.

In this case we are called on to determine whether § 2012 of the New York Education Law, McKinney's Consol. Laws, c. 16, is constitutional. The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, filed suit in federal court claiming that § 2012 denied him equal protection of the laws in violation of the Fourteenth Amendment. With one judge dissenting, a three-judge District Court dismissed appellant's complaint. Finding that § 2012 does violate the Equal Protection Clause of the Fourteenth Amendment, we reverse.

New York law provides basically three methods of school board selection. In some large city districts, the school board is appointed by the mayor or city council. N.Y. Educ. Law §§ 2553, subds. 2, 4 (1953), as amended (Supp.1968). On the other hand, in some cities, primarily those with less than 125,000 residents, the school board is elected at general or municipal elections in which all qualified city voters may participate. N.Y. Educ. Law §§ 2502, subd. 2, 2553, subd. 3 (1953). Cf. N.Y. Educ. Law § 2531 (1953). Finally, in other districts such as the one involved in this case, which are primarily rural and suburban, the school board is elected at an annual meeting of qualified school district voters.

At the outset, it is important to note what is not at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. Carrington v. Rash, 380 U.S. 89, 91; Pope v. Williams, 193 U.S. 621 (1904). The sole issue in this case is whether the additional requirements of § 2012 – requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections – violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws.

“In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). And, in this case, we must give the statute a close and exacting examination. “[S]ince
the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” Reynolds v. Sims, 377 U.S. 533, 562. This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a “rational basis” for the distinctions made are not applicable. See Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given “rational” classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. In fact, we have held that where a county school board is an administrative, not legislative, body, its members need not be elected. Sailors v. Kent County Bd. of Education, 387 U.S. 105, 108 (1967). However, “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” Harper v. Virginia Bd. of Elections, supra, 383 U.S., at 665.

Nor is the need for close judicial examination affected because the district meetings and the school board do not have “general” legislative powers. Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not. For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. Assuming the council were elected consistent with the commands of the Equal Protection Clause, the delegation of power to the mayor would not call for this Court's exacting review. On the other hand, if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.

Besides appellant and others who similarly live in their parents' homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither
own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.

Appellant asserts that excluding him from participation in the district elections denies him equal protection of the laws. He contends that he and others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that “the decisions taken by local boards . . . may have grave consequences to the entire population.” Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community.

We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to “members of the community of interest”– those “primarily interested in such elections.” Second, appellees urge that the State may reasonably and permissibly conclude that “property taxpayers” (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those “primarily interested” in school affairs.

We do not understand appellees to argue that the State is attempting to limit the franchise to those “subjectively concerned” about school matters. Rather, they appear to argue that the State's legitimate interest is in restricting a voice in school matters to those “directly affected” by such decisions. The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are “directly” affected by property tax changes should be allowed to vote. Similarly, parents of children in school are thought to have a “direct” stake in school affairs and are given a vote.

Appellees argue that it is necessary to limit the franchise to those “primarily interested” in school affairs because “the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system.” Appellees say that many communications of school boards and school administrations are sent home to the parents through the district pupils and are “not broadcast to the general public”; thus, nonparents will be less informed than parents. Further, appellees argue, those who are assessed for local property taxes (either directly or indirectly through rent) will have enough of an interest “through the burden on their pocketbooks, to acquire such information as they may need.”

We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those “primarily interested” or “primarily affected.” Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited. For, assuming, arguendo, that New York legitimately might limit the franchise in these school district elections to those “primarily interested in school affairs,” close scrutiny of the § 2012 classifications demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise.
Whether classifications allegedly limiting the franchise to those resident citizens “primarily interested” deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions. [FN15: For example, appellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.]

Nor do appellees offer any justification for the exclusion of seemingly interested and informed residents – other than to argue that the § 2012 classifications include those “whom the State could understandably deem to be the most intimately interested in actions taken by the school board,” and urge that “the task of . . . balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the Legislature.” But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those “primarily interested” in school affairs to justify the denial of the franchise to appellant and members of his class.

Justice STEWART, with whom Justice BLACK, and Justice HARLAN join, dissenting.

In Lassiter v. Northampton County Election Bd., 360 U.S. 45 (1955) this Court upheld against constitutional attack a literacy requirement, applicable to voters in all state and federal elections, imposed by the State of North Carolina. Writing for a unanimous Court, Mr. Justice Douglas said: “The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, Pope v. Williams, 193 U.S. 621, 663; Mason v. Missouri, 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns.” 360 U.S., at 50-51.

Although at times variously phrased, the traditional test of a statute's validity under the Equal Protection Clause is a familiar one: a legislative classification is invalid only “if it rest(s) on grounds wholly irrelevant to achievement of the regulation's objectives.” Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556. It was under just such a test that the literacy requirement involved in Lassiter was upheld. The premise of our decision in that case was that a State may constitutionally impose upon its citizens voting requirements reasonably “designed to promote intelligent use of the ballot.” 360 U.S., at 51. A similar premise underlies the proposition, consistently endorsed by this Court, that a State may exclude nonresidents from participation in its elections. Such residence
requirements, designed to help ensure that voters have a substantial stake in the outcome of elections and an opportunity to become familiar with the candidates and issues voted upon, are entirely permissible exercises of state authority. Indeed, the appellant explicitly concedes, as he must, the validity of voting requirements relating to residence, literacy, and age. [Ed.: As indicated by *Katzenbach v. Morgan*, excerpted at § 7.4.2, literacy tests have been held to violate the Voting Rights Act of 1965, and thus are not in use anywhere today.]

New York has made the judgment that local educational policy is best left to those persons who have certain direct and definable interests in that policy: those who are either immediately involved as parents of school children or who, as owners or lessees of taxable property are burdened with the local cost of funding school district operations. True, persons outside those classes may be genuinely interested in the conduct of a school district's business – just as commuters from New Jersey may be genuinely interested in the outcome of a New York City election. But unless this Court is to claim a monopoly of wisdom regarding the sound operation of school systems in the 50 States, I see no way to justify the conclusion that the legislative classification involved here is not rationally related to a legitimate legislative purpose. “There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them.” *Doremus v. Board of Educ.*, 342 U.S. 429, 435 (Douglas, J., dissenting).

With good reason, the Court does not really argue the contrary. Instead, it strikes down New York's statute by asserting that the traditional equal protection standard is inapt in this case, and that a considerably stricter standard – under which classifications relating to “the franchise” are to be subjected to “exacting judicial scrutiny” – should be applied. But the asserted justification for applying such a standard cannot withstand analysis.

The Court is quite explicit in explaining why it believes this statute should be given “close scrutiny”: “The presumption of constitutionality and the approval given ‘rational’ classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.” (Footnote omitted.)

I am at a loss to understand how such reasoning is at all relevant to the present case. The voting qualifications at issue have been promulgated, not by Union Free School District No. 15, but by the New York State Legislature, and the appellant is of course fully able to participate in the election of representatives in that body. There is simply no claim whatever here that the state government is not “structured so as to represent fairly all the people,” including the appellant.

Nor is there any other jurisdiction for imposing the Court's “exacting” equal protection test. This case does not involve racial classifications, which in light of the genesis of the Fourteenth Amendment have traditionally been viewed as inherently “suspect.” And this statute is not one that impinges upon a constitutionally protected right, and that consequently can be justified only by a “compelling” state interest. For “the Constitution of the United States does not confer the right of suffrage upon any one . . . .” *Minor v. Happersett*, [79 U.S. 159,] 162, 178 [(1870).]
In any event, it seems to me that under any equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. First of all, it must be emphasized – despite the Court's undifferentiated references to what it terms “the franchise” – that we are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and federal financial assistance [are made].

Secondly, the appellant is of course limited to asserting his own rights, not the purported rights of hypothetical childless clergymen or parents of preschool children, who neither own nor rent taxable property. The appellant's status is merely that of a citizen who says he is interested in the affairs of his local public schools. If the Constitution requires that he must be given a decision-making role in the governance of those affairs, then it seems to me that any individual who seeks such a role must be given it. For as I have suggested, there is no persuasive reason for distinguishing constitutionally between the voter qualifications New York has required for its Union Free School District elections and qualifications based on factors such as age, residence, or literacy.

Despite the dissent’s view there is “fair representation” because voters can vote for the legislature, just not the local school board, recall a legislature cannot change constitutional requirements for later acts, as held in Chadha, excerpted at § 9.3, and Clinton v. City of New York, excerpted at § 9.4.

Ball v. James

Justice STEWART delivered the opinion of the Court.

This appeal concerns the constitutionality of the system for electing the directors of a large water reclamation district in Arizona, a system which, in essence, limits voting eligibility to landowners and apportions voting power according to the amount of land a voter owns. The case requires us to consider whether the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment.

The public entity at issue here is the Salt River Project Agricultural Improvement and Power District, which stores and delivers untreated water to the owners of land comprising 236,000 acres in central Arizona. The District, formed as a governmental entity in 1937, subsidizes its water operations by selling electricity, and has become the supplier of electric power for hundreds of thousands of people in an area including a large part of metropolitan Phoenix. Nevertheless, the history of the District began in the efforts of Arizona farmers in the 19th century to irrigate the arid lands of the Salt River Valley, and, as the parties have stipulated, the primary purposes of the District have always been the storage, delivery, and conservation of water.
The Association faced serious financial difficulties during the Depression as it built new dams and other works for the project, and it sought a means of borrowing money that would not overly encumber the subscribers' lands. The means seemed to be available in Arizona's Agricultural Improvement District Act of 1922, which authorized the creation of special public water districts within federal reclamation projects. Ariz. Rev. Code of 1928, § 3467 et seq. Such districts, as political subdivisions of the State, could issue bonds exempt from federal income tax. Nevertheless, many Association members opposed creating a special district for the project, in part because the state statute would have required that voting power in elections for directors of the district be distributed per capita among landowners, and not according to the acreage formula for stock assessments and water rights. In 1936, in response to a request from the Association, the state legislature amended the 1922 statute. Under the new statutory scheme, which is essentially the one at issue in this case, the legislature allowed the district to limit voting for its directors to voters, otherwise regularly qualified under state law, who own land within the district, and to apportion voting power among those landowners according to the number of acres owned. Ariz. Rev. Stat. Ann. §§ 45-909, 45-983 (Supp.1980-1981).

This lawsuit was brought by a class of registered voters who live within the geographic boundaries of the District, and who own either no land or less than an acre of land within the District. The complaint alleged that the District enjoys such governmental powers as the power to condemn land, to sell tax-exempt bonds, and to levy taxes on real property. It also alleged that because the District sells electricity to virtually half the population of Arizona, and because, through its water operations, it can exercise significant influence on flood control and environmental management within its boundaries, the District's policies and actions have a substantial effect on all people who live within the District, regardless of property ownership. Seeking declaratory and injunctive relief, the appellees claimed that the acreage-based scheme for electing directors of the District violates the Equal Protection Clause of the Fourteenth Amendment.

*Reynolds v. Sims,* supra, held that the Equal Protection Clause requires adherence to the principle of one-person, one-vote in elections of state legislators. *Avery v. Midland County,* 390 U.S. 474 [(1968)], extended the *Reynolds* rule to the election of officials of a county government, holding that the elected officials exercised “general governmental powers over the entire geographic area served by the body.” 390 U.S., at 485. The Court, however, reserved any decision on the application of *Reynolds* to “a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.” 390 U.S., at 483-484. In *Hadley v. Junior College District,* 397 U.S. 50 [(1970)], the Court extended *Reynolds* to the election of trustees of a community college district because those trustees “exercised general governmental powers” and “perform[ed] important governmental functions” that had significant effect on all citizens residing within the district. 397 U.S., at 53-54. But in that case the Court stated: “It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required . . . .” Id., at 56.

The Court found such a case in *Salyer.* The Tulare Lake Basin Water Storage District involved there encompassed 193,000 acres, 85% of which were farmed by one or another of four corporations.
Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S., at 723. Under California law, public water districts could acquire, store, conserve, and distribute water, and though the Tulare Lake Basin Water Storage District had never chosen to do so, could generate and sell any form of power it saw fit to support its water operations. Id., at 723-724. The costs of the project were assessed against each landowner according to the water benefits the landowner received. Id., at 724. At issue in the case was the constitutionality of the scheme for electing the directors of the district, under which only landowners could vote, and voting power was apportioned according to the assessed valuation of the voting landowner's property. The Court recognized that the Tulare Lake Basin Water Storage District did exercise “some typical governmental powers,” including the power to hire and fire workers, contract for construction of projects, condemn private property, and issue general obligation bonds. Id., at 728, and n.7. Nevertheless, the Court concluded that the district had “relatively limited authority,” because “its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin.” Id., at 728. (footnote omitted). The Court also noted that the financial burdens of the district could not but fall on the landowners, in proportion to the benefits they received from the district, and that the district's actions therefore disproportionately affected the voting landowners. Id., at 729. The Salyer Court thus held that the strictures of Reynolds did not apply to the Tulare District, and proceeded to inquire simply whether the statutory voting scheme based on land valuation at least bore some relevancy to the statute's objective. The Court concluded that the California Legislature could have reasonably assumed that without voting power apportioned according to the value of their land, the landowners might not have been willing to subject their lands to the lien of the very assessments which made the creation of the district possible. 410 U.S., at 731.

As noted by the Court of Appeals, the services currently provided by the Salt River District are more diverse and affect far more people than those of the Tulare Lake Basin Water Storage District. Whereas the Tulare District included an area entirely devoted to agriculture and populated by only 77 persons, the Salt River District includes almost half the population of the State, including large parts of Phoenix and other cities. Moreover, the Salt River District, unlike the Tulare District, has exercised its statutory power to generate and sell electric power, and has become one of the largest suppliers of such power in the State. Further, whereas all the water delivered by the Tulare District went for agriculture, roughly 40% of the water delivered by the Salt River District goes to urban areas or is used for nonagricultural purposes in farming areas. Finally whereas all operating costs of the Tulare District were born by the voting landowners through assessments apportioned according to land value, most of the capital and operating costs of the Salt River District have been met through the revenues generated by the selling of electric power. Nevertheless, a careful examination of the Salt River District reveals that, under the principles of the Avery, Hadley, and Salyer cases, these distinctions do not amount to a constitutional difference.

First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of Reynolds. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.
Second, though they were characterized broadly by the Court of Appeals, even the District's water functions, which constitute the primary and originating purpose of the District, are relatively narrow. The District and Association do not own, sell, or buy water, nor do they control the use of any water they have delivered. The District simply stores water behind its dams, conserves it from loss, and delivers it through project canals. It is true, as the Court of Appeals noted, that as much as 40% of the water delivered by the District goes for nonagricultural purposes. But the distinction between agricultural and urban land is of no special constitutional significance in this context. The constitutionally relevant fact is that all water delivered by the Salt River District, like the water delivered by the Tulare Lake Basin Water Storage District, is distributed according to land ownership, and the District does not and cannot control the use to which the landowners who are entitled to the water choose to put it. As repeatedly recognized by the Arizona courts, though the state legislature has allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefitting a specific group of landowners. Niedner v. Salt River Project Agricultural Improvement and Power Dist., 590 P.2d 447; Uhlmann v. Wren, 401 P.2d 113, 124; Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power Dist., 275 P.2d 393, 402. As in *Salyer*, the nominal public character of such an entity cannot transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election.

As in the *Salyer* case, we conclude that the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. Here, according to the stipulation of the parties, the subscriptions of land which made the Association and then the District possible might well have never occurred had not the subscribing landowners been assured a special voice in the conduct of the District's business. Therefore, as in *Salyer*, the State could rationally limit the vote to landowners. Moreover, Arizona could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations.

Justice POWELL, concurring.

I concur fully in the Court's opinion, and write separately only to emphasize the importance to my decision of the Arizona Legislature's control over voting requirements for the Salt River District. The Court previously has held that when a governmental entity exercises functions that are removed from the core duties of government and disproportionately affect a particular group of citizens, that group may exercise more immediate control over the management of the entity than their numbers would dictate. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). See *Hadley v. Junior College District*, 397 U.S. 50, 56 (1970); *Avery v. Midland County*, 390 U.S. 474, 483-484 (1968). This rule is consistent with the principle of “one person, one vote” applicable to the elections of bodies that exercise general governmental powers. *Reynolds v. Sims*, 377 U.S. 533 (1964). The Salt River District is a governmental entity only in the limited sense that the State has empowered it to deal with particular problems of resource and service management. The District does not exercise the crucial powers of sovereignty typical of a general purpose unit of government, such as a State, county, or municipality.
Justice WHITE, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

In concluding that the District's “one-acre, one-vote” scheme is constitutional, the Court misapplies the limited exception recognized in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), on the strained logic that the provision of water and electricity to several hundred thousand citizens is a “peculiarly narrow function.” Because the Court misreads our prior cases and its opinion is conceptually unsound, I dissent.

To be sure, the Court approved limiting the vote to landowners in electing the board of directors of a Water Storage District in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*. But nothing in *Salyer* changed the relevant constitutional inquiry. Rather, the Court held the *Reynolds-Avery-Kramer* line of cases inapplicable to the water district because of its “special limited purpose and the disproportionate effect of its activities on landowners as a group. . . .” 410 U.S., at 728 (emphasis supplied). Although the water district there involved exercised certain governmental authorities, its purposes were quite narrow. The Water Storage District was also found to have only an insubstantial effect on nonvoters. Only 77 persons lived within its boundaries and most worked for one of the four corporations which owned 85% of the land within the District. On the other hand, the burdens of the District fell entirely on landowners since all of the costs associated with the District's projects were assessed against landowners in proportion to the benefits received. There was “no way that the economic burdens of district operations can fall on residents qua residents. . . .” Id., at 729.

An analysis of the two relevant factors required by *Salyer* demonstrates that the Salt River District possesses significant governmental authority and has a sufficiently wide effect on nonvoters to require application of the strict scrutiny mandated by *Kramer*.

The District involved here clearly exercises substantial governmental powers. The District is a municipal corporation organized under the laws of Arizona and is not, in any sense of the word, a private corporation. Pursuant to the Arizona Constitution, such districts are “political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States.” Ariz. Const., Art. 13, § 7. Under the relevant statute controlling agricultural improvement districts, the District is “a public, political, taxing subdivision of the state, and a municipal corporation to the extent of the powers and privileges conferred by this chapter or granted generally to municipal corporations by the constitution and statutes of the state, including immunity of its property and bonds from taxation.” Ariz. Rev. Stat. Ann. § 45-902 (1956) The District's bonds are tax exempt, and its property is not subject to state or local property taxation. This attribute clearly indicates the governmental nature of the District's function. The District also has the power of eminent domain, a matter of some import. The District has also been given the power to enter into a wide range of contractual arrangements to secure energy sources. Inherent in this authorization is the power to control the use and source of energy generated by the District, including the possible use of nuclear power. Obviously, this broad authorization over the field of energy transcends the limited functions of the agricultural water storage district involved in *Salyer*.
In terms of the relative impact of the Salt River District's operations on the favored landowner voters and those who may not vote for the officers of this municipal corporation, the contrast with the Water District in *Salyer* is even more pronounced. A bird's-eye view of the District's operations will be helpful. Historically, the Salt River District was concerned only with storing water and delivering it for agricultural uses within the District. This was a crucial service, but it proved too expensive for a wholly private concern to maintain. It needed public help, which it received. It became a municipal corporation, a transformation which rendered its bonds and property tax exempt. It also needed a public subsidy, which was provided by authorizing it to engage in the generation and sale of electricity. It was also authorized to supply water for municipal and other nonagricultural uses.

The area within the District, once primarily rural, now encompasses eight municipalities and a major part of the city of Phoenix. Its original purpose, the supply of irrigation water, now provides only a tiny fraction of its gross income. For the fiscal year ending April 30, 1980, the District had a total operating income of approximately $450 million, 98% of which was derived from the generation of electricity and its sale to approximately 240,000 consumers. See Salt River Project, 1979-1980 Annual Report, p. 25. The District is now the second largest utility in Arizona. Furthermore, as of April 30, 1980, the District had outstanding long-term debt of slightly over $2 billion. Approximately $1.78 billion, or about 88%, of that debt are in the form of revenue bonds secured solely by the revenues from the District's electrical operations. All of the District's capital improvements since 1972 have been financed by revenue bonds, and the general obligation bonds, now representing a small fraction of the District's long-term debt, are being steadily retired from the District's general revenues. It must also be noted that at the present time, 40% of the water delivered by the District is used for nonagricultural purposes – 25% for municipal purposes and 15% to schools, playgrounds, parks, and the like.

It is indeed curious that the Court would attempt to characterize the District's electrical operations as “incidental” to its water operations, or would consider the power operations to be irrelevant to the legality of the voting scheme. The facts are that in *Salyer* the burdens of the Water District fell entirely on the landowners who were served by the District. Here the landowners could not themselves afford to finance their own project and turned to a public agency to help them. That agency now subsidizes the storage and delivery of irrigation water for agricultural purposes by selling electricity to the public at prices that neither the voters nor any representative public agency has any right to control. Unlike the situation in *Salyer*, the financial burden of supplying irrigation water has been shifted from the landowners to the consumers of electricity.

The purpose and authority of the Salt River District are of extreme *public* importance. The District affects the daily lives of thousands of citizens who because of the present voting scheme and the powers vested in the District by the State are unable to participate in any meaningful way in the conduct of the District's operations. In my view, the Court of Appeals properly reasoned that the limited exception recognized in *Salyer* does not save this voting arrangement. I cannot agree with the Court's extension of *Salyer* to the facts of the case, and its unwise suggestion that the provision of electrical and water services are somehow too private to warrant the Fourteenth Amendment's safeguards. Accordingly, I dissent.
The Court has also applied this kind of “second-order” reasonableness review in cases dealing with limitations on the rights of prisoners to vote, as in *O’Brien v. Skinner.* Because prisoners give up many rights that persons not incarcerated take for granted, burdens on prisoners’ right to vote are not viewed as severe or substantial burdens. Because of the constitutional presumption of innocence, however, persons being held in jail, prior to be convicted, have full voting rights and must be provided with absentee ballots. In *O’Brien*, the Court held it was also unconstitutional to deny an absentee ballot to those serving “misdeamenor” sentences who were otherwise qualified to vote. Once convicted of a felony, the Court has permitted states to limit the right to vote based upon text in the 14th Amendment, as discussed in *Richardson v. Ramirez*, which permit states to limit the right to vote “for participation in rebellion, or other crimes.” Based on arguments of history, the Court limited this denial of rights to “felonies” or other “infamous crimes” consistent with state practice in 1868. As of 2004, states dealt with felony disenfranchisement in six different ways: “(1) two states do not disenfranchise felons [Maine & Vermont]; (2) sixteen states plus the District of Columbia disenfranchise felons only during incarceration; (3) four states disenfranchise felons during incarceration and parole; (4) fourteen states disenfranchise felons during incarceration, parole, and probation; (5) eight states disenfranchise some ex-felons for life; and (6) six states disenfranchise all ex-felons for life.”

While the practical effect of such laws is to disproportionately exclude various minority groups, particularly African-Americans, from voting, since a larger percentage of such individuals have felony convictions, no litigation has successfully challenged felony disenfranchisement statutes on race discrimination grounds.

### § 24.3 Regulating Ability to Vote: Voter ID Laws and Other Regulations

In a trilogy of cases between 1983 and 1997, the Court explored how to phrase the relevant test for analyzing burdens on the fundamental right to vote in cases where strict scrutiny would not be applied. Each of these cases involved the individual’s fundamental First Amendment Freedom of Association right in the voting rights context, addressed at § 11.2.2 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK: THE FIRST AMENDMENT (2018) (http://libguides.stcl.edu/kelsomaterials), rather than the fundamental Equal Protection Clause right regarding voting. However, the Court has never indicated the test should be any different since both cases involve fundamental voting rights issues.

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9 414 U.S. 524, 527-30 (1974); id. at 535 (Blackmun, J., joined by Rehnquist, J., dissenting).


The first case, Andersen v. Celebrezze,13 in 1983, involved a March filing date for candidates to run for President, which a 5-4 Court found unreasonable when applied to independent candidates, as “several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions.” The Court stated, “[T]he state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. . . . [A] court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court . . . also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” The use of word “important” was not indicative of intermediate review, as the Court noted later in its opinion, “If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.”14

The second case in the trilogy was Burdick v. Takushi,15 decided in 1992. In Burdick, a 6-3 Court upheld Hawaii’s ban on writing-in voting. The Court stated, “[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system ‘creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.’ . . . A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff's rights.’”16

13 460 U.S. 780, 788-89 (1983); id. at 806-08 (Rehnquist, J., joined by White, Powell & O'Connor, JJ., dissenting) (regulation permissible as allowing “reasonable” access to the ballot).

14 Id. at 806, quoting Kusper v. Pontikes, 414 U.S. 51, 59 (1973). The Court had earlier held in Rosario v. Rockefeller, 410 U.S. 752, 760-62 (1973), that a New York law requiring voters to register 8 months prior to a presidential primary, or 11 month prior to a nonpresidential primary, to vote in the primary was not an “unconstitutionally onerous burden.” Four Justices dissented, noting only one other state had similarly burdensome regulations. Id. at 763-64 (Powell, J., joined by Douglas, Brennan & Marshall, JJ., dissenting).

15 504 U.S. 428, 434, 441-42, 437-38 (1992) (burden of proof on challenger, as Court “rejected the petitioner’s argument.”); id. at 442-43, 446-48 (Kennedy, J., joined by Blackmun and Stevens, JJ., dissenting) (write-in ban constitutes a “significant burden” on voting rights similar to Reynolds v. Sims, rendering presumption of constitutionality in error; “it is useful to remember that until the late 1880's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888.”).

16 Id. at 433-34, quoting Anderson v. Celebrezze, 460 U.S. at 788-89.
The third case, in 1997, was *Timmons v. Twin Cities Area New Party*. 17 *Timmons* involved a Minnesota “antifusion” law that prohibited candidates from appearing on the ballot as the candidate of more than one political party. For example, a Republican candidate could not appear on both the Republican and Libertarian party lines, or a Democratic candidate could not appear on both the Democratic and Green party lines. In *Timmons*, a 6-3 Court stated, “[A] State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’ . . . [T]he burdens Minnesota’s fusion ban imposes on the New Party’s associational rights are justified by ‘correspondingly weighty’ valid state interests in ballot integrity and political stability.” The dissenting Justices viewed the ban as unconstitutionally burdensome.

In *Timmons*, both the majority and the two dissenting opinions agreed that for “severe” burdens on an individual’s First Amendment associational rights a strict scrutiny standard is appropriate.18 For less severe burdens, Justice Souter’s dissent opted for intermediate review, and thus had the advantage of clarity. By considering only those interests put forward by the government in litigation, Justice Stevens’ dissent, joined by Justice Ginsburg and Souter, also appeared to adopt an intermediate form of review.19 Because of its willingness to consider conceivable governmental interests, the majority opinion is best viewed as the kind of second-order reasonableness balancing discussed at § 24.1 nn.1-3. As in *Anderson*, the majority’s language in *Timmons* about the government needing “important” interests to regulate—an intermediate requirement regarding government interests—appears to be completely unnecessary to the case, and to serve no useful purpose. Indeed, when cataloguing the state’s interests, the majority noted that “[s]tates certainly have an interest in protecting integrity, fairness, and efficiency of their ballots and election processes,”20 without any further finding that those interests were important or substantial.

Each of these cases involved some level of review higher than minimum rationality review, as each involved the Court undertaking a real weighing of the benefits and burdens of the regulation, not substantial deference to government, against a backdrop of less burdensome alternatives. In each case, the burden was on the challenger to prove unconstitutionality. In each case, legitimate government interests could be used to justify the regulation, despite the occasional use of the word “important.” Each therefore represents a kind of second-order reasonableness balancing discussed at § 24.1 nn.1-3. The Court’s returned to the issue of voting rights in cases that do not trigger strict scrutiny, and the “hard judgment” they entail, in 2008 in *Crawford v. Marion County Election Bd.*

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17 520 U.S. 351, 358, 369 (1997); id. at 371-72 (Stevens, J., joined by Ginsburg, J., & Souter, J., dissenting); id. at 382 (Souter, J., dissenting).

18 Id. at 358; id. at 374 (Stevens, J., joined by Ginsburg, J., & Souter, J., dissenting); id. at 382 (Souter, J., dissenting).

19 Id. at 383 n.2 (Souter, J., dissenting); id. at 377-78 (Stevens, J., joined by Ginsburg, J., & Souter, J., dissenting). For discussion of considering interests put forward in litigation and intermediate review, different than the any conceivable basis of rational review, see § 22.3 n.35.

20 520 U.S. at 364.
Justice STEVENS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and Justice KENNEDY join.

At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

Referred to as either the “Voter ID Law” or “SEA 483,” the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. Ind. Code Ann. § 3-11-8-25.1(e) (West Supp.2007). A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. §§ 3-11.7-5-1, 3-11.7-5-2.5(c) (West 2006). A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk's office within 10 days. § 3-11.7-5-2.5(b). No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and identity. § 9-24-16-10(b) (West Supp.2007).

In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. See id., at 685 (opinion of Harlan, J.). Applying a stricter standard, we concluded that a State “violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” Id., at 666 (opinion of the Court). We used the term “invidiously discriminate” to describe conduct prohibited under that standard, noting that we had previously held that while a State may obviously impose “reasonable residence restrictions on the availability of the ballot,” it “may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services.” Id., at 666-667 (citing Carrington v. Rash, 380 U.S. 89, 96 (1965)). Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications.

Thus, under the standard applied in Harper, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In Anderson v. Celebrezze, 460 U.S. 780 (1983), however, we confirmed the general rule that “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are not invidious and satisfy the standard set forth in Harper. 460 U.S., at 788, n.9. Rather than applying any “litmus test” . . ., we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the “hard judgment” that our adversary system demands.
In later election cases we have followed Anderson's balancing approach. Thus, in Norman v. Reed, 502 U.S. 279, 288-289 (1992), after identifying the burden Illinois imposed on a political party's access to the ballot, we “called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation,” and concluded that the “severe restriction” was not justified by a narrowly drawn state interest of compelling importance. Later, in Burdick v. Takushi, 504 U.S. 428 (1992), we applied Anderson's standard for “reasonable, nondiscriminatory restrictions,” 504 U.S., at 434, and upheld Hawaii's prohibition on write-in voting despite the fact that it prevented a significant number of “voters from participating in Hawaii elections in a meaningful manner,” id., at 443, 112 S.Ct. 2059 (Kennedy, J., dissenting). We reaffirmed Anderson's requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the “precise interests put forward by the State as justifications for the burden imposed by its rule.” 504 U.S., at 434 (quoting Anderson, 460 U.S., at 789.).

Contrary to Justice Scalia's suggestion (opinion concurring in judgment), our approach remains faithful to Anderson and Burdick. The Burdick opinion was explicit in its endorsement and adherence to Anderson, see 504 U.S., at 434, and repeatedly cited Anderson, see 504 U.S., at 436, n.5, 440, n.9, 441. To be sure, Burdick rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote; but in its place, the Court applied the “flexible standard” set forth in Anderson. 504 U.S., at 434. Burdick surely did not create a novel “deferential ‘important regulatory interests' standard.”

In neither Norman nor Burdick did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as Harper demonstrates, it must be justified by relevant and legitimate state interests “sufficiently weighty to justify the limitation.” Norman, 502 U.S., at 288-289. We therefore begin our analysis of the constitutionality of Indiana's statute by focusing on those interests.

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters. While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified. Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.

The first is the interest in deterring and detecting voter fraud. The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient. The State also argues that it has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration – namely, that Indiana's voter registration rolls include a large number of names of persons who are either deceased or no longer live in Indiana. Finally, the State relies on its interest in safeguarding voter confidence. Each of these interests merits separate comment.
Election Modernization

Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote.

In the National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, 42 U.S.C. § 1973gg et seq., Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process. § 1973gg. The statute requires state motor vehicle driver's license applications to serve as voter registration applications. § 1973gg-3. While that requirement has increased the number of registered voters, the statute also contains a provision restricting States' ability to remove names from the lists of registered voters. § 1973gg-6(a)(3). These protections have been partly responsible for inflated lists of registered voters. For example, evidence credited by Judge Barker estimated that as of 2004 Indiana's voter rolls were inflated by as much as 41.4%, see 458 F.Supp.2d, at 793, and data collected by the Election Assistance Committee in 2004 indicated that 19 of 92 Indiana counties had registration totals exceeding 100% of the 2004 voting-age population, Dept. of Justice Complaint in United States v. Indiana, No. 1:06-cv-1000-RLY-TAB (SD Ind., June 27, 2006), p. 4, App. 313. [Ed: This is principally caused by voters who have died, or moved out of the county, still be included in the registration rolls.]

In HAVA [Help America Vote Act of 2002], Congress required every State to create and maintain a computerized statewide list of all registered voters. 42 U.S.C. § 15483(a). HAVA also requires the States to verify voter information contained in a voter registration application and specifies either an “applicant's driver's license number” or “the last 4 digits of the applicant's social security number” as acceptable verifications. § 15483(a)(5)(A)(i). If an individual has neither number, the State is required to assign the applicant a voter identification number. § 15483(a)(5)(A)(ii).

HAVA also imposes new identification requirements for individuals registering to vote for the first time who submit their applications by mail. If the voter is casting his ballot in person, he must present local election officials with written identification, which may be either “a current and valid photo identification” or another form of documentation such as a bank statement or paycheck. § 15483(b)(2)(A). If the voter is voting by mail, he must include a copy of the identification with his ballot. A voter may also include a copy of the documentation with his application or provide his driver's license number or Social Security number for verification. § 15483(b)(3). Finally, in a provision entitled “Fail-safe voting,” HAVA authorizes the casting of provisional ballots by challenged voters. § 15483(b)(2)(B).

Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology. That conclusion is also supported by a report issued shortly after the enactment of SEA 483 by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases. In the introduction to their discussion of voter identification, they made these pertinent comments: “A good registration
list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed. There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.” Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136-137 (Carter-Baker Report) (footnote omitted).

**Voter Fraud**

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

**Safeguarding Voter Confidence**

Finally, the State contends that it has an interest in protecting public confidence “in the integrity and legitimacy of representative government.” Brief for State Respondents, No. 07-25, p. 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.” Supra, at 1618.

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of States have relied primarily on photo identification. A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the
constitutionality of SEA 483; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character. For a survey of state practice, see Brief for State of Texas et al. as Amici Curiae 10-14, and nn. 1-23.

The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483. The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in Harper, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. Only a few weeks ago we held that the Court of Appeals for the Ninth Circuit had failed to give appropriate weight to the magnitude of that burden when it sustained a preelection, facial attack on a Washington statute regulating that State's primary election procedures. Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008).

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the
burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification; Judge Barker found petitioners' expert's report to be “utterly incredible and unreliable.” 458 F.Supp.2d, at 803. Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.

Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. The record includes depositions of two case managers at a day shelter for homeless persons and the depositions of members of the plaintiff organizations, none of whom expressed a personal inability to vote under SEA 483. A deposition from a named plaintiff describes the difficulty the elderly woman had in obtaining an identification card, although her testimony indicated that she intended to return to the BMV since she had recently obtained her birth certificate and that she was able to pay the birth certificate fee. App. 94.

Judge Barker's opinion makes reference to six other elderly named plaintiffs who do not have photo identifications, but several of these individuals have birth certificates or were born in Indiana and have not indicated how difficult it would be for them to obtain a birth certificate. 458 F.Supp.2d, at 797-799. One elderly named plaintiff stated that she had attempted to obtain a birth certificate from Tennessee, but had not been successful, and another testified that he did not know how to obtain a birth certificate from North Carolina. The elderly in Indiana, however, may have an easier time obtaining a photo identification card than the nonelderly, see n.17, supra, and although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification.

The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. While one elderly man stated that he did not have the money to pay for a birth certificate, when asked if he did not have the money or did not wish to spend it, he replied, “both.” App. 211-212. From this limited evidence we do not know the magnitude of the impact SEA 483 will have on indigent voters in Indiana. The record does contain the affidavit of one homeless woman who has a copy of her birth certificate, but was denied a photo identification card because she did not have an address. Id., at 67. But that single affidavit gives no indication of how common the problem is.

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes “excessively burdensome requirements” on any class of voters. See Storer v. Brown, 415 U.S. 724, 738 (1974). A facial challenge must fail where the statute has a “‘plainly legitimate sweep.’” Washington State Grange, 128 S.Ct., at 1190 (quoting Washington v. Glucksberg, 521 U.S. 702, 739-740, and n.7 (1997) (Stevens, J., concurring in judgments)). When we consider only the statute's broad application to all Indiana voters we conclude that it “imposes only a limited burden on voters' rights.” Burdick, 504 U.S., at 439. The “precise interests” advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483. Id., at 434.
The lead opinion assumes petitioners' premise that the voter-identification law “may have imposed a special burden on” some voters, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified. To evaluate a law respecting the right to vote – whether it governs voter qualifications, candidate selection, or the voting process – we use the approach set out in Burdick v. Takushi, 504 U.S. 428 (1992). This calls for application of a deferential “important regulatory interests” standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. Id., at 433-434 (internal quotation marks omitted). The lead opinion resists the import of Burdick by characterizing it as simply adopting “the balancing approach” of Anderson v. Celebrezze, 460 U.S. 780 (1983) (majority opinion of Stevens, J.). Although Burdick liberally quoted Anderson, Burdick forged Anderson’s amorphous “flexible standard” into something resembling an administrable rule. See Burdick, supra, at 434. Since Burdick, we have repeatedly reaffirmed the primacy of its two-track approach. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); Clingman v. Beaver, 544 U.S. 581, 586-587 (2005). “[S]trict scrutiny is appropriate only if the burden is severe.” Id., at 592. Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring “nominal effort” of everyone, are not severe. See id., at 591, 593-597. Burdens are severe if they go beyond the merely inconvenient. See Storer v. Brown, 415 U.S. 724, 728-729 (1974) (characterizing the law in Williams v. Rhodes, 393 U.S. 23 (1968) [Ed.: new party must obtain petitions signed by qualified voters totaling 15% of number of ballots cast in the last gubernatorial election], as “severe” because it was “so burdensome” as to be “‘virtually impossible’” to satisfy).

The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes. In the course of concluding that the Hawaii laws at issue in Burdick “impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote,” 504 U.S., at 439, we considered the laws and their reasonably foreseeable effect on voters generally. See id., at 436-437. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances. That was essentially the approach of the Burdick dissenters, who would have applied strict scrutiny to the laws because of their effect on “some voters.” See id., at 446 (Kennedy, J., dissenting); see also id., at 448 (“The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon some individual voters . . . .” (emphasis added)). Subsequent cases have followed Burdick's generalized review of nondiscriminatory election laws. See, e.g., Timmons, supra, at 361-362; Clingman, supra, at 590-591, 592-593. Indeed, Clingman's holding that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden.

Not all of our decisions predating Burdick addressed whether a challenged voting regulation severely burdened the right to vote, but when we began to grapple with the magnitude of burdens, we did so categorically and did not consider the peculiar circumstances of individual voters or
candidates. See, e.g., Jenness v. Fortson, 403 U.S. 431, 438-441 (1971). Thus, in Rosario v. Rockefeller, 410 U.S. 752 (1973), we did not link the State's interest in inhibiting party raiding with the petitioners' own circumstances. See id., at 760-762. And in Storer v. Brown, supra, we observed that the severity of the burden of a regulation should be measured according to its "nature, extent, and likely impact." Id., at 738 (emphasis added). We therefore instructed the District Court to decide on remand whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" Id., at 742 (emphasis added). Notably, we did not suggest that the District Court should consider whether one of the petitioners would actually find it more difficult than a reasonably diligent candidate to obtain the required signatures. What mattered was the general assessment of the burden.

Even if I thought that stare decisis did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. See Art. I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, ex ante, whether the burden they impose is too severe.

The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not "even represent a significant increase over the usual burdens of voting." And the State's interests are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence – not a constitutional imperative that falls short of what is required.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Indiana's "Voter ID Law" threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, and a significant percentage of those individuals are likely to be deterred from voting. The statute is unconstitutional under the balancing standard of Burdick v. Takushi, 504 U.S. 428 (1992): 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 State has made no such justification here, and as to some aspects of its law, it has hardly even tried. I therefore respectfully dissent from the Court's judgment sustaining the statute.

Under Burdick, “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights,” 504 U.S., at 434, upon an assessment of the “character and magnitude of the asserted [threatened] injury,” ibid. (quoting Anderson, supra, at 789), and an estimate of the number of voters likely to be affected.

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. The travel is required for the personal visit to a license branch of the Indiana Bureau of Motor Vehicles (BMV), which is demanded of anyone applying for a driver's license or nondriver photo identification. See 458 F.Supp.2d 775, 791 (S.D. Ind.2006). The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive, witness the fact that the BMV has far fewer license branches in each county than there are voting precincts. Marion County, for example, has over 900 active voting precincts, see Brief for Respondent Marion County Election Board 4, yet only 12 BMV license branches; in Lake County, there are 565 active voting precincts, see n.6, supra, to match up with only 8 BMV locations; and Allen County, with 309 active voting precincts, see ibid., has only 3 BMV license branches. The same pattern holds in counties with smaller populations. Brown County has 12 active voter precincts, see ibid., and only one BMV office; while there were 18 polling places available in Fayette County's 2007 municipal primary, there was only 1 BMV license branch; and Henry County, with 42 polling places approved for 2008 elections, has only 1 BMV office.

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably serious for many of the individuals who lack photo identification. They almost certainly will not own cars, see Brief for Current and Former State Secretaries of State as Amici Curiae 11, and public transportation in Indiana is fairly limited. According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92 counties have no public transportation system at all, and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties. Among the counties with some public system, 21 provide service only within certain cities, and 32 others restrict public transportation to regional county service, leaving only 18 that offer countywide public transportation, see n.15, supra. State officials recognize the effect that travel costs can have on voter turnout, as in Marion County, for example, where efforts have been made to “establish[ ] most polling places in locations even more convenient than the statutory minimum,” in order to “provide[ ] for neighborhood voting.” Brief for Respondent Marion County Election Board 3-4.

For those voters who can afford the round trip, a second financial hurdle appears: in order to get photo identification for the first time, they need to present “a birth certificate, certificate of
naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.” Ind. Admin. Code, tit. 140, § 7-4-3 (2008)). As the lead opinion says, the two most common of these documents come at a price: Indiana counties charge anywhere from $3 to $12 for a birth certificate (and in some other States the fee is significantly higher), see ante, at 1620, n.17, and that same price must usually be paid for a first-time passport, since a birth certificate is required to prove U.S. citizenship by birth. The total fees for a passport, moreover, are up to about $100. So most voters must pay at least one fee to get the ID necessary to cast a regular ballot. As with the travel costs, these fees are far from shocking on their face, but in the Burdick analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers “indigent” as well as those with religious objections to being photographed, and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana's chosen exception does not amount to much relief. [FN19: To vote by provisional ballot, an individual must (at the circuit court clerk's office) sign an affidavit affirming that she is “indigent” and “unable to obtain proof of identification without the payment of a fee.” Ind.Code Ann. § 3-11.7-5-2.5(c)(2)(A) (West 2006). Indiana law does not define the key terms “indigent” or “unable,” but I will assume for present purposes that the Indiana Supreme Court will eventually construe these terms broadly, so that the income threshold for indigency is at least at the federal poverty level, and so that the exception covers even individuals who are facing only short-term financial difficulties.]

All of this suggests that provisional ballots do not obviate the burdens of getting photo identification. And even if that were not so, the provisional-ballot option would be inadequate for a further reason: the indigency exception by definition offers no relief to those voters who do not consider themselves (or would not be considered) indigent but as a practical matter would find it hard, for nonfinancial reasons, to get the required ID (most obviously the disabled).

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not “severe” ones, and the next question under Burdick is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

Although the District Court found that petitioners failed to offer any reliable empirical study of numbers of voters affected, we may accept that court's rough calculation that 43,000 voting-age residents lack the kind of identification card required by Indiana's law. See 458 F.Supp.2d, at 807. The District Court made that estimate by comparing BMV records reproduced in petitioners' statistician's report with U.S. Census Bureau figures for Indiana's voting-age population in 2004, see ibid., and the State does not argue that these raw data are unreliable.

The upshot is this. Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically, see 472 F.3d 949, 951 (C.A.7 2007) (“No doubt most people who don't have photo ID are low on the economic ladder”); cf. Bullock v. Carter, 405 U.S. 134, 144 (1972) (“[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status”).
Voter ID Law places hurdles in the way of either getting an ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting. Cf. 458 F.Supp.2d, at 823 (“We do not doubt that such individuals exist somewhere, even though Plaintiffs were unable to locate them”); 472 F.3d, at 952 (“No doubt there are at least a few [whom the law will deter from voting] in Indiana . . . .”).

Because the lead opinion finds only “limited” burdens on the right to vote, it avoids a hard look at the State's claimed interests. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of “the precise interests put forward by the State as justifications for the burden imposed by its rule,” [and] ‘the extent to which those interests make it necessary to burden the plaintiff's rights.’” Burdick, 504 U.S., at 434 (quoting Anderson, 460 U.S., at 789).

As the lead opinion sees it, the State has offered four related concerns that suffice to justify the Voter ID Law: modernizing election procedures, combating voter fraud, addressing the consequences of the State's bloated voter rolls, and protecting public confidence in the integrity of the electoral process. On closer look, however, it appears that the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case.

The lead opinion's discussion of the State's reasons begins with the State's asserted interests in “election modernization,” and in combating voter fraud. Although these are given separate headings, any line drawn between them is unconvincing; as I understand it, the “effort to modernize elections,” Brief for State Respondents 12, is not for modernity's sake, but to reach certain practical (or political) objectives. In any event, if a proposed modernization were in fact aimless, if it were put forward as change for change's sake, a State could not justify any appreciable burden on the right to vote that might ensue; useless technology has no constitutional value. And in fact that is not the case here. The State says that it adopted the ID law principally to combat voter fraud, and it is this claim, not the slogan of “election modernization,” that warrants attention.

There is no denying the abstract importance, the compelling nature, of combating voter fraud. See Purcell, 549 U.S., at 4 (acknowledging “the State's compelling interest in preventing voter fraud”); cf. Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 231 (1989) (“A State indisputably has a compelling interest in preserving the integrity of its election process”). But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana, see 458 F.Supp.2d, at 793; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot stuffing, ballot miscounting, voter intimidation, or any other type of corruption on the part of officials administering elections. See Brief for Brennan Center for Justice et al. as Amici Curiae 7.
And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. See 458 F.Supp.2d, at 792-793. Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State. See 458 F.Supp.2d, at 793. This absence of support is consistent with the experience of several veteran poll watchers in Indiana, each of whom submitted testimony in the District Court that he had never witnessed an instance of attempted voter impersonation fraud at the polls. Ibid. It is also consistent with the dearth of evidence of in-person voter impersonation in any other part of the country. See ante, at 1619, n.12 (lead opinion) (conceding that there are at most “scattered instances of in-person voter fraud”); see also Brief for Brennan Center for Justice, supra, at 11-25, 25 (demonstrating that “the national evidence – including the very evidence relied on by the courts below – suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the ‘problem’ of voter impersonation is not a real problem at all.”

The State responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to detect. But this is like saying the “man who wasn't there” is hard to spot, and to know whether difficulty in detection accounts for the lack of evidence one at least has to ask whether in-person voter impersonation is (or would be) relatively harder to ferret out than other kinds of fraud (e.g., by absentee ballot) which the State has had no trouble documenting. The answer seems to be no; there is reason to think that “impersonation of voters is . . . the most likely type of fraud to be discovered.” U.S. Election Assistance Commission, Election Crimes: An Initial Review and Recommendations for Future Study 9 (Dec.2006) hereinafter EAC Report). This is in part because an individual who impersonates another at the polls commits his fraud in the open, under the scrutiny of local pollworkers who may well recognize a fraudulent voter when they hear who he claims to be. See Brief for Respondents Marion County Election Board 6 (“[P]recinct workers may recognize an imposter, and precinct election workers have the authority to challenge persons appearing to vote if the election board member ‘is not satisfied that a person who offers to vote is the person who the person represents the person to be’” (quoting Ind.Code Ann. § 3-11-8-27 (West 2006))).

The relative ease of discovering in-person voter impersonation is also owing to the odds that any such fraud will be committed by “organized groups such as campaigns or political parties” rather than by individuals acting alone. L. Minnite & D. Callahan, Securing the Vote: An Analysis of Election Fraud 14 (2003). It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few who may commit it. If an imposter gets caught, he is subject to severe criminal penalties. See, e.g., Ind.Code Ann. § 3–14–2–9 (West 2006) (making it a felony “knowingly [to] vot[e] or offe[r] to vote at an election when the person is not registered or authorized to vote”).

In briefing this Court, the State responds by pointing to an interest in keeping lines at polling places short. See Brief for State Respondents 58. It warns that “[i]f election workers – a scarce resource in any election – must attend to the details of validating provisional ballots, voters may have to wait longer to vote,” and it assures us that “[n]othing deters voting so much as long lines at the polls.”
Ibid. But this argument fails on its own terms, for whatever might be the number of individuals casting a provisional ballot, the State could simply allow voters to sign the indigency affidavit at the polls subject to review there after the election. After all, the Voter ID Law already requires voters lacking photo identification to sign, at the polling site, an affidavit attesting to proper registration. See 458 F.Supp.2d, at 786.

Indeed, the State's argument more than fails; it backfires, in implicitly conceding that a not-insignificant number of individuals will need to rely on the burdensome provisional-ballot mechanism. What is more, as the District Court found, the Voter ID Law itself actually increases the likelihood of delay at the polls. Since any minor discrepancy between a voter's photo identification card and the registration information may lead to a challenge, “the opportunities for presenting challenges have increased as a result of the photo identification requirements.” \textit{Id.}, at 789; cf. 472 F.3d, at 955 (Evans, J., dissenting) (“The potential for mischief with this law is obvious. Does the name on the ID ‘conform’ to the name on the voter registration list? If the last name of a newly married woman is on the ID but her maiden name is on the registration list, does it conform? If a name is misspelled on one – Schmit versus Schmitt – does it conform? If a ‘Terence’ appears on one and a shortened ‘Terry’ on the other, does it conform?”).

The State's asserted interests in modernizing elections and combating fraud are decidedly modest; at best, they fail to offset the clear inference that thousands of Indiana citizens will be discouraged from voting. The two remaining justifications, meanwhile, actually weaken the State's case.

The lead opinion agrees with the State that “the inflation of its voter rolls provides further support for its enactment of” the Voter ID Law. This is a puzzling conclusion, given the fact, which the lead opinion notes, that the National Government filed a complaint against Indiana, containing this allegation: “Indiana has failed to conduct a general program that makes a reasonable effort to identify and remove ineligible voters from the State's registration list; has failed to remove such ineligible voters; and has failed to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters.” App. 309, 312.

The Federal Government and the State agreed to settle the case, and a consent decree and order have been entered, requiring Indiana to fulfill its list-maintenance obligations under § 8 of the National Voter Registration Act of 1993, 107 Stat. 82, 42 U.S.C. § 1973gg–6.

How any of this can justify restrictions on the right to vote is difficult to say. The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. . . .

The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence.
Justice BREYER, dissenting.

Indiana's statute requires registered voters to present photo identification at the polls. It imposes a burden upon some voters, but it does so in order to prevent fraud, to build confidence in the voting system, and thereby to maintain the integrity of the voting process. In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking “whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).” Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); ante, at 1616-1617 (lead opinion) (similar standard); ante, at 1613-1614 (Souter, J., dissenting) (same standard). Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.

I cannot agree . . . with Justice Stevens' or Justice Scalia's assessment of the burdens imposed by the statute. The Carter-Baker Commission conditioned its recommendation upon the States' willingness to ensure that the requisite photo IDs “be easily available and issued free of charge” and that the requirement be “phased in” over two federal election cycles, to ease the transition. Carter-Baker Report, at App. 139, 140. And as described in . . . Justice Souter's dissenting opinion, Indiana's law fails to satisfy these aspects of the Commission's recommendation.

By way of contrast, two other States – Florida and Georgia – have put into practice photo ID requirements significantly less restrictive than Indiana's. Under the Florida law, the range of permissible forms of photo ID is substantially greater than in Indiana. See Fla. Stat. Ann. § 101.043(1) (West Supp.2008) (including a debit or credit card, a student ID, a retirement center ID, a neighborhood association ID, and a public assistance ID). Moreover, a Florida voter who lacks photo ID may cast a provisional ballot at the polling place that will be counted if the State determines that his signature matches the one on his voter registration form. §§ 101.043(2); 101.048(2)(b).

Georgia restricts voters to a more limited list of acceptable photo IDs than does Florida, but accepts in addition to proof of voter registration a broader range of underlying documentation than does Indiana. See Ga. Code Ann. § 21-2-417 (Supp.2007); Ga. Comp. Rules & Regs., Rule 183-1-20.01 (2006) (permissible underlying documents include a paycheck stub, Social Security, Medicare, or Medicaid statement, school transcript, or federal affidavit of birth, as long as the document includes the voter's full name and date of birth). Moreover, a Federal District Court found that Georgia “has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [state-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID.” Common Cause/Georgia v. Billups, 504 F.Supp.2d 1333, 1380 (N.D.Ga.2007). While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia any voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Compare Ind. Code Ann. § 3-11-4-1 (West 2006) with Ga. Code Ann. § 21-2-381 (Supp.2007).
Finally, neither Georgia nor Florida insists, as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States . . . . Nor is there any reason to think that there are proportionately fewer such voters in Indiana than elsewhere in the country (the District Court's rough estimate was 43,000). See 458 F.Supp.2d 775, 807 (S.D.Ind.2006). And I need not determine the constitutionality of Florida's or Georgia's requirements (matters not before us), in order to conclude that Indiana's requirement imposes a significantly harsher, unjustified burden.

Similar decisions have been reached by Courts of Appeals reviewing other state or local voter ID laws. Since 2010, a number of states have passed various versions of photo ID laws, some without the provisional ballot aspect of the Indiana law in Crawford, and some denying certain kinds of photo IDs, such as a college or university ID, from being used in Wisconsin and Texas. In addition, substantial empirical support now exists to conclude that there is virtually no problem of voter fraud caused by persons faking identification in voting, and real burdens exist for tens of thousands of individuals – many poor, some elderly, some college students – who don’t have a driver’s license or other regularized government issued photo ID. Even if the photo ID itself is provided by the state free, getting the required documentation, such as a copy of a birth certificate, will require some expenditure of money – certainly an amount more than $1.50 poll tax (in today’s money roughly $10) ruled unconstitutional in Harper, excerpted at § 24.2. This issue is likely to come before the Supreme Court again soon, as jurisdictions never covered by the preclearance requirement of the Voting Rights Act, such as Pennslyvania and Wisconsin, and jurisdictions whose voter ID laws are no longer blocked by a preclearance requirement after Shelby County, Alabama v. Holder, discussed at § 20.4 nn.61-62, such as North Carolina and Texas, will have their voter ID laws tested in court. The restrictions will be tested under Crawford and under § 2 of the Voting Rights Act as creating an unlawful disparate impact on voting participation based on race, discussed at § 20.4 n.62.22

21  See ACLU of New Mexico v. Santillanes, 546 F.3d 1313 (10th Cir. 2008) (Albuquerque, New Mexico); Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) (Georgia).

§ 24.4  Vote Counting and Recounting Procedures, Including Bush v. Gore

The most noteworthy recent case involving equal protection issues and the right to vote in the context of vote count and recounting procedures is Bush v. Gore. In this case, the Court considered the constitutionality of the Florida Supreme Court’s recount decision in the 2000 Presidential election between Governor George W. Bush and Vice-President Al Gore. One concern was the Florida Supreme Court’s decision to recount only “undervotes” but not “overvotes.” “Undervotes” can occur if the machine does not register a vote, as would occur if the voter had punched a punch card, but either did not pierce the card at all but only left an indentation, or punched the card but did not dislodge the chad. “Overvotes” can occur where the machine indicates more than one vote had been cast, as would occur for a voter marking a candidates’ name, but then also writing in that candidate’s name on the write-in line. A second concern was with the differing ways different Florida counties chose to count the undervotes, some viewing an indentation as being sufficient to determine voter intent, while other counties required the card to be punched through, which is the more normal requirement states use in recounting punch card ballots. All of these issues were critical because under the original November 26, 2000 certified result, Bush’s lead over Gore in Florida was just 537 votes, with Bush having received 2,912,790 votes and Gore 2,912,253.

Faced with these facts, seven Justices agreed that there were equal protection problems with the recount ordered by the Florida Supreme Court. Five of these seven Justices concluded there was no way factually for a constitutionally adequate recount to be completed in time. In contrast, Justice Souter and Breyer concluded that the majority should not presume that a constitutionally adequate recount could not be completed in time.


25 531 U.S. at 111 (per curiam opinion) (“Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court.”); id. at 134 (Souter, J., joined by Breyer, J. in Part III, dissenting) (“I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights.”). Justices Stevens and Ginsburg decided that these problems were not serious enough to justify a finding of a violation of the equal protection clause. Id. at 143 (Ginsburg, J., joined by Stevens, J. in Part II, dissenting).

26 Id. at 110 (“[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”).

27 Id. at 135 (Souter, J., joined by Breyer, J. in Part III, dissenting) (“Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply [in 6 days time].”).
It should be noted that the five Justices in the majority, and the four Justices in dissent, did disagree on whether the Court should have taken the case at all. Strong arguments made in dissenting opinions in *Bush v. Gore* suggested that the case was either a political question, or was not yet ripe for resolution. As Justice Souter noted in one dissent, “If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedures provided in 3 U.S.C. § 15.”

Justice Breyer noted in another dissent, “[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. . . . [T]here is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court.” Despite these observations, and legislative and executive practice following the procedures provided in the Electoral Count Act of 1877, codified at 3 U.S.C. § 15, one author has argued that the Electoral Count Act is unconstitutional, based on literal text and context kind of considerations.

The majority *per curiam* opinion in *Bush v. Gore* did not directly address the issues of ripeness and political questions. Justice Scalia did address indirectly the ripeness argument in his concurrence to the Emergency Stay Order, which also served as a grant of a petition for certiorari in the case. He concluded that “irreparable injury” would result to “petitioner [Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.” One can ask, however, whether it was ripe to conclude there would be a “cloud” on the “legitimacy” of the election if Congress were simply allowed to follow the constitutionally proscribed procedures for counting electoral votes without prior court intervention. In fact, based upon a later media-backed recount of the votes in Florida, it appears that Bush would have remained ahead even if the Florida recount had been allowed to proceed. At that point, Al Gore would have conceded the election, and there would have been no need for the Supreme Court decision in the case.

Regarding the political questions issue, Justice Kennedy did observe during oral argument in the case that there are judicially manageable standards under the Equal Protection Clause to govern resolution of this dispute, thus making reference to one of the six factors used in *Baker v. Carr*, discussed at § 4.3.1(D) n.49, to determine if a political question exists. The opposing political questions argument is that while the Court routinely addresses equal protection complaints regarding

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28 *Id.* at 129 (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting).

29 *Id.* at 154-55 (Breyer, J., joined by Stevens, J., & Ginsburg, J., dissenting).


elections, the issue of selecting electors is a special circumstance under the 12th Amendment, which commits to Congress the responsibility to count electoral votes, and under Article II, § 1, cl. 2, which commits the method of selecting electors to the exclusive power of state legislatures. Under these provisions, there are “textually demonstrable constitutional commitments” to “coordinate political departments,” and thus under Baker v. Carr it could be regarded as a political question.33

In addition to this issue, a number of other issues were involved in the recount in Florida. One involved voter confusion with the “Butterfly Ballot” in Palm Beach County. Instead of having names for all candidates on the left of the ballot, and holes to punch to indicate one’s vote on the right, the Butterfly Ballot had names on both sides of the ballot, with holes in the middle. Although this was done to get the names of all Presidential candidates on one page of the ballot, this resulted in Gore being assigned the third hole down on the ballot, even though his name appeared second in the left-handed column. Based on statistical analysis, this confusion probably resulted in “well over” 2,000 votes for Pat Buchanan, whose was assigned punch hole 2, being misplaced Gore votes, since Gore’s name appeared second in the left-handed column, with perhaps an equal number of votes invalidated because two holes were punched given the confusion of the ballot.34

Another issue involved use of faulty lists of alleged felons, thereby disenfranchising thousands of voters, most of them African-Americans, who, based on exit polling of African-Americans generally, would likely have voted for Al Gore at a greater than 90% rate. While estimates vary between 2,000 to 8,000 as to the number of such voters who were wrongly denied the ability to vote in Florida during the 2000 election, a mid-range estimate of 4,000 is probably most likely.35 It has been noted, “Currently, approximately 3.9 million people nationwide cannot vote due to felony convictions; about one in fifty adults. A side effect of high minority crime rates is that those disenfranchised are disproportionately black or Hispanic. Nearly 1.4 million black Americans (thirteen percent of all black men) cannot vote due to felon disenfranchisement. In Florida and Alabama, nearly one-third of black men cannot vote. African-American men as a group account for

33 See generally Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76-78 (2000) (“in such Manner as the Legislature thereof may direct” means that this exclusive legislative power cannot be circumscribed by the Florida Constitution); cf. Nixon v. United States, 506 U.S. 224 (1993) (“sole” power of Senate to try impeachments means Senate decisions regarding impeachment are political questions not subject to Court review). For discussion of both the ripeness and political questions issues as applied to Bush v. Gore, see generally Erwin Chemerinsky, Bush v. Gore Was Not Justiciable, 76 Notre Dame L. Rev. 1093 (2001).


nearly thirty-six percent of all those disenfranchised nationwide.” Challenges to such disenfranchisement laws on grounds that, given this effect, they are the product of racially discriminatory intent, or in any event violate the Voting Rights Act, have failed.

Another issue involved the ballots in Duval County, which includes Jacksonville, Florida. In this county, the ballot had Presidential candidates on two pages of the ballot, given the number of individuals qualified to run for President in the state of Florida in 2000. Usual practice is to try to have all the candidates for one office be on the same page. That confusion apparently led approximately 26,000 voters, many in predominantly African-American precincts, to punch holes on both pages of the ballot for President, thus invalidating their votes for Al Gore on the first page.

Under standard election law, because there is no way to know for sure how the person would have voted in any of these cases – Butterfly Ballot mistakes, wrongly disenfranchised voters, or more than one candidate marked for President – none of these lost votes for Gore could be counted. On the other hand, for “overvotes” that occurred because the voter marked a candidates’ name, but then also wrote that same candidate’s name on the write-in line, manual inspection can tell that the voter intended to vote for that candidate. Standard election law permits those ballots to be counted. That mistake is more likely to happen in counties which use machine-readable paper ballots, with a more easily available write-in line, rather than punch card ballots. Since most of those counties that used such paper ballots in Florida were Bush strongholds, Al Gore did not ask for that recount to be done, although Bush attorneys took the position at the last minute that if a further recount was going to be ordered by the Florida courts, it should include counting of such overvotes. As it turned out, according to the media recount of the ballots after the election in Florida, had those overvote ballots been counted, Al Gore would have won the election, since more of his voters made that mistake than did Bush voters, even in counties that overall went for Bush. Thus, ironically, Al Gore did not ask for a recount of both undervotes and overvotes, which would have been more consistent with equal protection principles, and yet that was the only way he would win. Also, ironically, the only way Bush would have lost the recount is if the Florida courts had adopted the Bush attorneys’ view that the overvote recounting should be done.

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37 See generally id. at 852-99; Hayden v. Pataki, 449 F.3d 305, 309-10 (2nd Cir. 2006) (8-5 *en banc* decision) (Voting Rights Act provisions on dilution of minority voting strength do not apply to felony disenfranchisement statutes); id. at 330 (Walker, C.J. joined by Jacobs, J., concurring) (even if the Voting Rights Act applied, the Act would then be unconstitutional because Congress would have exceeded its enforcement power under the 14th and 15th Amendments).


39 *See* Rambo, *supra* note 24, at 325 n.1479.
With respect to lost votes for Bush, the networks did predict at 7:50 p.m., based on exit polls, that Gore would win Florida, 50 minutes after the polls had closed in most of Florida, but 10 minutes before the polls closed in the Western panhandle part of Florida, a Bush stronghold. This led some Bush partisans to allege that some of those Bush voters went home and did not vote, and this cost Bush thousands of votes. Since there is no way to know for sure how many individuals went home, or how they would have voted, a court could not have compensated for that problem. How many went home is speculative, as other candidates were on the ballot, including a close Senate race.

Since *Bush v. Gore* was decided in December, 2000, few election challenges based upon *Bush v. Gore* as a precedent have succeeded. The recount authorized by the Florida Supreme Court was ruled unconstitutional because it was so flawed in design (different ways to count punch card ballots in different counties and only counting undervotes, not overvotes) that it was not a reasonable recount procedure, as 7 of the 9 Justices held in the case. Most other election inequalities, however, such as optical scan machines in some counties of a state (more reliable but more costly), but punch cards in others (more prone to error but cheaper), or differences in the amount of voting booths provided (so that in poor areas the lines typically are longer because not as many machines are provided), may be unfair, but are not likely to be viewed as unreasonable under a “second-order” *Anderson* or *Burdick* kind of analysis. This is so because considerations of administrative costs can be used as a legitimate government interest under “reasonableness” review to justify such disparities. For this reason, *Bush v. Gore* has not been viewed as very relevant in other election cases, because those cases do not present the same unreasonableness as was present in the Florida recount.

In addition, there are issues surrounding electronic voting equipment, or DREs (for digital recording electronic device). The main concern here is security of the machines from hackers and accurate electronic counting of the votes. Given these problems, some states have required a voter-verified paper trail for counties using DRE devices.

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PART VIII: FUNDAMENTAL RIGHTS DOCTRINE

CHAPTER 25: DEVELOPMENT OF FUNDAMENTAL RIGHTS DOCTRINE

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§ 25.1 Introduction to Fundamental Rights Analysis

As discussed at § 24.1 nn.1-3, one branch of fundamental rights analysis involves determining whether a burden on a fundamental right, like the right to vote, violates the Equal Protection Clause. Another concern is whether the burden on a fundamental right violates the Due Process Clause. The Due Process Clause of the Fifth Amendment, applicable to the federal government, provides “nor shall any person . . . be deprived of life, liberty, or property, without due process of law.” The same language in § 1 of the 14th Amendment, applicable against states and local government, provides, “No State shall deprive any person of life, liberty, or property, without due process of law.” It was commonly understood at the time of the ratification of the original Constitution in 1789 and the Fifth Amendment in 1791, that "due process" referred to the settled usages and modes of proceeding existing in the common and statute law of England, not shown unsuited to conditions in this country.1 Due process, thus, usually referred to proper procedures. Only occasionally was due process thought to have a substantive component, as noted at § 17.1.1 n.2.2

Despite this fact, subsequent to ratification of the 14th Amendment, the Court has provided individuals with a number of substantive protections through the Due Process Clause. As noted at § 14.3.1(B) n.53-54, the original intent of the framers and ratifiers of the 14th Amendment probably was to provide for substantive immunities through the 14th Amendment Privileges or Immunities Clause. However, as noted at § 14.3.1(B) n.52, the Court gave the Privileges or Immunities Clause a narrow interpretation in the Slaughter-House Cases in 1873. Since 1876, in Munn v. Illinois, discussed at § 17.1.2 nn.3-12, the Court has provided substantive protection through the doctrine known as “substantive due process.” The main consequence of this doctrine is that all “persons” are granted these substantive protections, while if the doctrine had been developed under the

1 See generally Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1789 (1833).

Privileges or Immunities Clause, that Clause would have limited the rights to “citizens,” as in Justice Harlan’s dissent utilizing the Guarantee Clause in Plessy v. Ferguson, discussed at § 20.2 nn.36-37.

The doctrine of substantive due process has two parts: “enumerated” rights and “unenumerated” rights. “Enumerated” rights are those rights textually stated in the Constitution which are deemed fundamental. As discussed at § 14.3.2 nn.75-80, this includes virtually all of the Bill of Rights from the First Amendment to the Eighth Amendment, with the exception of the Fifth Amendment grand jury indictment in criminal cases and the Seventh Amendment right to jury trial in civil cases. “Unenumerated” rights include those rights which the Court has found are “implicit in the concept of ordered liberty,” even though not textually stated in the Constitution.

One justification for this branch of fundamental rights is the Ninth Amendment. The Ninth Amendment provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This text, taken literally, does not itself create rights. Instead, the text states a rule of constitutional interpretation that calls upon those who construe the Constitution to recognize that the people have retained some rights not specified by the Constitution. From this perspective, the Ninth Amendment is a reminder of the background natural law theory that animated the Constitution’s drafting that individuals have natural rights that the government is created to protect. As has been noted, “The Founding generation disagreed about many things, but the existence of natural rights was not one of them. From James Madison to Roger Sherman, from The Federalist Papers to the Antifederalist papers, both supporters and opponents of the Constitution repeatedly affirmed their shared belief in natural rights.”

One concern that Madison and others had in drafting the Bill of Rights was that under the maxim of construction, expressio unius est exclusio alterius (the expression of one thing implies exclusion of others), the enumeration of certain rights in the Bill of Rights might suggest that the federal government had plenary power over all other matters. As Justice Joseph Story wrote in 1833: “[The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and é converso, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.”

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The classic definition of what rights are “implicit in the concept of ordered liberty” occurred in *Palko v. Connecticut*, where Justice Cardozo asked whether the right is “so rooted in the traditions and collective conscience of the people as to be ranked as fundamental.” In *Griswold v. Connecticut,* Justice Goldberg said such rights derive “from experience with the requirements of a free society.” In *Bowers v. Hardwick,* Justice White asked whether the right is “deeply rooted in this Nation’s history and tradition.”

Although not explicitly acknowledged by the functionally driven courts of the Holmesian and instrumentalist eras, the definition of fundamental rights has two separate branches that are becoming clearer given the more analytic predisposition of the modern natural law era. One branch focuses on “history” and “traditions”; the other branch focuses on “collective conscience” and “the requirements of a free society.” As phrased in 1997 by Chief Justice Rehnquist in *Washington v. Glucksberg,* excerpted at § 27.2, the two branches of what rights are “implicit in the concept of ordered liberty” are: “[1] those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or [2] so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.”

In general, formalist and Holmesian judges, as positivists, rely more on history and traditions in their development of fundamental rights. This is true for formalist judges, who focus on historical traditions at the time a constitutional provision was ratified, as part of their belief in a static Constitution, noted at § 1.1.2 n.8. It is also true for Holmesian judges, whose deference-to-government predisposition, noted at § 1.1.2 n.9, suggests that fundamental rights should emerge from legislative and executive traditions, not court action. Instrumentalist and natural law judges are more willing to embrace the second branch of fundamental rights analysis concerning evolving standards of “conscience” and “requirements of a free society,” as the judges perceive these to have developed over time. This is part of the natural law commitment to reasoned elaboration of what is fundamental to our concept of constitutionally ordered liberty, and instrumentalist focus on sound social policy decisionmaking, noted at § 1.1.3 n.13.

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5  *Id.*


One aspect of reasoned elaboration of unenumerated fundamental rights involves reasoning from existing enumerated fundamental rights in the Bill of Rights to new unenumerated fundamental rights viewed as related to those enumerated rights by being within the “penumbras” or “emanations” of those rights. For example, in 1965 in *Griswold v. Connecticut*,\(^\text{11}\) excerpted at § 25.4, Justice Douglas said, in a case involving access to contraception by a married couple for use in their home, that there exists an unenumerated “right of privacy” related to several fundamental Bill of Rights provisions dealing with privacy. He referred to the First Amendment right of association, the Third Amendment's ban on the quartering of soldiers in one’s home, the Fourth Amendment right to be secure from unreasonable searches and seizures, and the self-incrimination clause of the Fifth Amendment.

A second kind of analysis involves “analogical” reasoning from earlier identified unenumerated fundamental rights to new unenumerated fundamental rights that flow from a process of reasoned elaboration. For example, the Court has indicated that “right of privacy” cases involve what is called “decisional privacy,” that is, an “interest in independence in making certain kinds of important decisions.”\(^\text{12}\) In 1942, the Court held in *Skinner v. Oklahoma*,\(^\text{13}\) excerpted at § 25.3, that married couples have a fundamental right to procreate. To the extent these are “decisional privacy” rights, this means the person should have a right to make a decision to procreate or not procreate. Thus, in *Griswold*, a second justification for the decision was that if a married couple has a right to procreate, they have a right to make decisions about procreation in their marital relationship.

One additional aspect of unenumerated fundamental rights doctrine deserves mention. In the modern, post-1937 era, substantial burdens on unenumerated fundamental rights typically trigger strict scrutiny, while less than substantial burdens trigger only the “second-order” reasonableness balancing discussed for the right to vote cases at § 24.1 & 24.3. During the earlier formalist era, any burden on an unenumerated fundamental right triggered the “third-order” reasonableness balancing discussed at § 24.1 nn.2-3, and mentioned with respect to *Lochner* at § 17.2 nn.42-43.

## § 25.2 Fundamental Rights and the Formalist Era: 1873-1937

In 1923, in *Meyer v. Nebraska*,\(^\text{14}\) excerpted below, the Court struck down a state ban on teaching German. In *Meyer*, the Court summarized the existing list of unenumerated fundamental rights at the time. While the unenumerated fundamental “right of the individual to contract” mentioned in *Meyer* – the *Lochner*-era right – was rejected by the Court in 1937 in *West Coast Hotel v. Parrish*, as discussed at § 17.1.3 nn.26-29 & § 17.1.4 nn.30-39, the remainder of the rights listed in *Meyer* have formed the basis for modern unenumerated fundamental rights analysis today.

\(^{11}\) 381 U.S. 479, 484-85 (1965).


\(^{13}\) 316 U.S. 535, 541-42 (1942).

\(^{14}\) 262 U.S. 390, 399-403 (1923).
Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade. The information is based upon “An act relating to the teaching of foreign languages in the state of Nebraska,” approved April 9, 1919 (Laws 1919, c. 249), which follows: “Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language. Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides. Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for any period not exceeding thirty days for each offense. Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.”

The Supreme Court of the state affirmed the judgment of conviction. 187 N.W. 100. It declared the offense charged and established was “the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,” in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power.

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Yick Wo v. Hopkins, 118 U.S. 356; Lochner v. New York, 198 U.S. 45; Twining v. New Jersey 211 U.S. 78; Truax v. Raich, 239 U.S. 33; Truax v. Corrigan, 257 U.S. 312; Wyeth v. Cambridge Board of Health, 200 Mass. 474. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U.S. 133, 137 [(1894) (“The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.”)].
The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The [Northwest] Ordinance of 1787 declares: “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and “that the English language should be and become the mother tongue of all children reared in this state.” It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war [Ed.: World War I, particularly our entrance against Germany] and aversion toward every character of turbulent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports.... [But n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.

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In *Meyer v. Nebraska*, the Court stated that individuals have a fundamental right “to marry, establish a home and bring up children.” Although not stated explicitly in *Meyer*, these rights can be seen as reflecting long-standing traditional practices in Western societies regarding individual rights, and thus appropriate for even a formalist court to acknowledge as “implicit in the concept of ordered liberty,” based upon the formalist historical focus on customs and traditions. Viewed as a matter of historical customs, this constellation of rights would only include the right of one man and one woman of the same race to marry (not polygamy, interracial marriage, or same-sex marriage), and then establish a home (not live together before marriage), and then bring up the children conceived in that marriage (not rights regarding illegitimate children). The literal text in *Meyer* supports that view, as the rights are notphrased as three independent rights – one right “to marry,” another right “to establish a home” independent of marriage, and a third right “to bring up children” – but are phrased as one set of related rights “to marry, establish a home and bring up children.”

Another formalist-era case where the state law interfered with this bundle of rights was in 1925 in *Pierce v. Society of Sisters*. There a state initiative passed by voters in 1922 required parents to send their children, aged 8-16, to a public school. The law was challenged by a Catholic society whose school would be put out of business. The Court struck down the law because it unreasonably interfered with the right of “parents and guardians” to direct the education of children under their control. The Court stated, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” In modern times, the Court has stated: “We have little doubt that the Due Process Clause would be offended ‘if a State were to attempt to force the breakup of a natural family, over the objection of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’”

In another formalist-era case, *Buck v. Bell*, the Court upheld in 1927 a law permitting sterilization of a person deemed mentally infirm, with the Court noting, per Justice Holmes, “Three generations of imbeciles are enough.” The case is consistent with the view that during the formalist era there

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was no fundamental right to procreate, even though there was, as stated in *Meyer* and *Pierce*, a right “to marry, establish a home and bring up children.” With respect to the particular individual involved in *Buck v. Bell*, it has been questioned whether Carrie Buck was, in fact, mentally infirm, or only had an 8th-grade education. In any case, she was a victim of the almost 20,000 “forced eugenic sterilizations” performed in the United States during the first third of the 20th Century.

The Court’s language in *Meyer* indicated that part of the liberty of the 14th Amendment was a liberty “to worship God according to the dictates of his own conscience.” The liberty “to worship God” is reflected in the First Amendment provision regarding the “free exercise” of religion, addressed in Chapter 42. Although listed as an unenumerated right in 1923 in *Meyer*, the Court later incorporated the First Amendment free exercise provision and made it applicable against the states, as the Court incorporated the other First Amendment rights, noted at § 14.3.1(B) nn.60-61. The language in *Meyer* regarding the “principles long recognized at common law as essential to the orderly pursuit of happiness” is reflective of the formalist focus on historical traditions, that is, “long recognized,” and the Declaration of Independence’s language regarding inalienable rights to “life, liberty, and the pursuit of happiness.” The aspect that the rights must be “recognized at common law” reflects the view of formalist and most Holmesian Justices that only official sources, such as legislative or executive practice, should be used to determine fundamental rights, and not non-official sources like social practice. This view, and the modern willingness of natural law and instrumentalist Justices to use social practice in the development of fundamental rights doctrine is discussed at § 27.1 nn.5-6 (formalist view), nn.7-11 (Holmesian view), nn.12-18 (natural law view), nn.22-23 (instrumentalist view), as part of considering the fundamental right of privacy.

**§ 25.3 Fundamental Rights and the Holmesian Era: 1937-1954**

The first case identifying a fundamental right to procreate was *Skinner v. Oklahoma*, excerpted below. Reflecting that fundamental rights can involve either Equal Protection or Due Process concerns depending on the statute, regulation, or other action, the Court held in *Skinner* that equal protection was denied by a statute permitting sterilization of persons thrice convicted of grand larceny, but not embezzlement. After noting irrevocable injury to a basic civil right was involved, Justice Douglas said, “[S]trict scrutiny of the classification which a State makes in a sterilization law is essential." A concurring opinion would have ruled the statute unconstitutional under Due Process.

*Skinner v. Oklahoma*

316 U.S. 535 (1942)

Justice DOUGLAS delivered the opinion of the Court.


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convicted two or more times for crimes “amounting to felonies involving moral turpitude” either in
an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in
Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. § 173.
Machinery is provided for the institution by the Attorney General of a proceeding against such a
person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile.
§§ 176, 177. Notice, an opportunity to be heard, and the right to a jury trial are provided. §§
177-181. The issues triable in such a proceeding are narrow and confined. If the court or jury finds
that the defendant is an “habitual criminal” and that he “may be rendered sexually sterile without
detriment to his or her general health,” then the court “shall render judgment to the effect that said
defendant be rendered sexually sterile” § 182, by the operation of vasectomy in case of a male and
of salpingectomy in case of a female. § 174. Only one other provision of the Act is material here and
that is § 195 which provides that “offenses arising out of the violation of the prohibitory laws [Ed.:
laws prohibiting immoral acts like drinking or gambling], revenue acts, embezzlement, or political
offenses, shall not come or be considered within the terms of this Act.”

Petitioner was convicted in 1926 of the crime of stealing chickens and was sentenced to the
Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with fire arms and
was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms and was
sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the
Attorney General instituted proceedings against him.

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In
Oklahoma grand larceny is a felony. Okl. St. Ann. Tit. 21, § 1705 (s 5). Larceny is grand larceny
when the property taken exceeds $20 in value. Id. § 1704. Embezzlement is punishable “in the
manner prescribed for feloniously stealing property of the value of that embezzled.” Id. § 1462.
Hence he who embezzles property worth more than $20 is guilty of a felony. A clerk who
appropriates over $20 from his employer's till (id. § 1456) and a stranger who steals the same
amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he
may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how
large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and
steals chickens commits a felony (id. § 1719); and he may be sterilized if he is thrice convicted. If,
however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Id. §
1455. Hence no matter how habitual his proclivities for embezzlement are and no matter how often
his conviction, he may not be sterilized.

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage
and procreation are fundamental to the very existence and survival of the race. The power to
sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands
it can cause races or types which are inimical to the dominant group to wither and disappear. There
is no redemption for the individual whom the law touches. Any experiment which the State conducts
is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not
to reexamine the scope of the police power of the States. We advert to them merely in emphasis of
our view that strict scrutiny of the classification which a State makes in a sterilization law is
essential, lest unwittingly or otherwise invidious discriminations are made against groups or types
of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of
“equal protection of the laws is a pledge of the protection of equal laws.” Yick Wo v. Hopkins, 118
U.S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the
same quality of offense and sterilizes one and not the other, it has made as an invidious a
discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo
v. Hopkins, supra; Gaines v. Canada, 305 U.S. 337. Sterilization of those who have thrice committed
grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable
discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick
or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's
line between larceny by fraud and embezzlement is determined, as we have noted, “with reference
to the time when the fraudulent intent to convert the property to the taker's own use’ arises. Riley
v. State, supra, 78 P.2d page 715. We have not the slightest basis for inferring that that line has any
significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions
which the law has marked between those two offenses.

Chief Justice STONE concurring.

If Oklahoma may resort generally to the sterilization of criminals on the assumption that their
propensities are transmissible to future generations by inheritance, I seriously doubt that the equal
protection clause requires it to apply the measure to all criminals in the first instance, or to none. See

Moreover, if we must presume that the legislature knows – what science has been unable to ascertain
– that the criminal tendencies of any class of habitual offenders are transmissible regardless of the
varying mental characteristics of its individuals, I should suppose that we must likewise presume
that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders
are more likely to be transmitted than those of others. And so I think the real question we have to
to consider is not one of equal protection, but whether the wholesale condemnation of a class to such
an invasion of personal liberty, without opportunity to any individual to show that his is not the type
of case which would justify resort to it, satisfies the demands of due process.

Science has found and the law has recognized that there are certain types of mental deficiency
associated with delinquency which are inheritable. But the State does not contend – nor can there
be any pretense – that either common knowledge or experience, or scientific investigation, has given
assurance that the criminal tendencies of any class of habitual offenders are universally or even
generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any
particular individual cannot rightly be dispensed with. Whether the procedure by which a statute
carries its mandate into execution satisfies due process is a matter of judicial cognizance. A law
which condemns, without hearing, all the individuals of a class to so harsh a measure as the present
because some or even many merit condemnation, is lacking in the first principles of due process.
Morrison v. California, 291 U.S. 82, 90, and cases cited; Taylor v. Georgia, 315 U.S. 25. And so,
while the state may protect itself from the demonstrably inheritable tendencies of the individual
which are injurious to society, the most elementary notions of due process would seem to require
it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects.

While not mentioned explicitly in *Skinner*, the case was decided against a backdrop of increased skepticism from the American Medical Association and other groups about the science behind eugenics sterilization during the late 1930s, and the increasing evidence in the early 1940s regarding the Nazi German massive program of eugenic sterilization – “in evil or reckless hands” language in Douglas’ opinion in *Skinner*. As a consequence, many states either had, or were in the process of, reducing or phasing out any program of eugenic sterilization by 1942, either by statute or executive practice.¹⁹ Thus, legislative and executive much more strongly supported recognizing a fundamental right of procreation in 1942 than in 1927 in *Buck v. Bell*, discussed at § 25.2 n.17. Implicit in the opinion also is a form of “analogical reasoning” that if there is a fundamental right to marry and to raise the children of that marriage, as held in *Meyer*, excerpted at § 25.2, then there should be a right to procreate children to raise. Thus, the Court in *Skinner* phrased the right in terms of “marriage and procreation are fundamental to the . . . survival of the race.”

**§ 25.4 Fundamental Rights and the Instrumentalist Era: 1954-1986**

Since 1954, the list of fundamental personal liberty rights has grown to include not only expanded rights to right to marry, establish a home, raise children, and procreate, but also a right not to procreate through access to contraception and abortion, and other personal liberty rights identified by the Court. As indicated *Zablocki v. Redhail*, excerpted below, strict scrutiny is applied to “direct and substantial” or “significant” burdens on these fundamental rights. Later cases make clear that less than substantial burdens trigger only the “second-order” reasonableness kind of balancing noted at § 24.1 & 24.3 regarding the fundamental right to vote. In a number of these areas, however, the Court has not been as clear as in the right to vote cases in phrasing the analysis in clear “second-order reasonableness” balancing terms.

1. **Right to Marry**

**Zablocki v. Redhail**  
434 U.S. 374 (1992)

Justice MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of a Wisconsin statute, Wis. Stat. §§ 245.10 (1), (4), (5) (1973), which provides that members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment." The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order "are not then and are not likely thereafter to become public charges." No marriage license may lawfully be issued in Wisconsin to a person covered by the statute, except upon court order; any marriage entered into without compliance with § 245.10 is declared void; and persons acquiring marriage licenses in violation of the section are subject to criminal penalties.

Appellee Redhail is a Wisconsin resident who, under the terms of § 245.10, is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency. The facts, according to the stipulation filed by the parties in the District Court, are as follows. In January 1972, when appellee was a minor and a high school student, a paternity action was instituted against him in Milwaukee County Court, alleging that he was the father of a baby girl born out of wedlock on July 5, 1971. After he appeared and admitted that he was the child's father, the court entered an order on May 12, 1972, adjudging appellee the father and ordering him to pay $109 per month as support for the child until she reached 18 years of age. From May 1972 until August 1974, appellee was unemployed and indigent, and consequently was unable to make any support payments.

On September 27, 1974, appellee filed an application for a marriage license with appellant Zablocki, the County Clerk of Milwaukee County, and a few days later the application was denied on the sole ground that appellee had not obtained a court order granting him permission to marry, as required by § 245.10.

On December 24, 1974, appellee filed his complaint in the District Court, on behalf of himself and the class of all Wisconsin residents who had been refused a marriage license pursuant to § 245.10(1) by one of the county clerks in Wisconsin. Zablocki was named as the defendant, individually and as representative of a class consisting of all county clerks in the State. The complaint alleged, among other things, that appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time. The statute was attacked on the grounds that it deprived appellee, and the class he sought to represent, of equal protection and due process rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.
In evaluating §§ 245.10(1), (4), (5) under the Equal Protection Clause, "we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974). Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 314 (1976).

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. See Califano v. Jobst, 434 U.S. 47, [55 (1977)] [Ed.: Social Security Act provision which provides for continuation of child’s insurance benefits for a disabled dependent child who marries someone eligible for social security benefits, but discontinues benefits if child marries person ineligible to receive social security benefits “reasonable for Congress” to adopt]. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. See, e.g., Carey v. Population Services International, 431 U.S., at 686; Memorial Hospital v. Maricopa County, 415 U.S., at 262-263. Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.

There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed. The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place – a fact as to which there is no evidence in the record – this interest obviously cannot support the withholding of court permission to marry once counseling is completed.

With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements. At argument, appellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior children and that
those children will not become public charges, the statute provides incentive for the applicant to make support payments to his children. Tr. of Oral Arg. 17-20. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties. And, if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders.

There is also some suggestion that § 245.10 protects the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations. But the challenged provisions of § 245.10 are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations. And, although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.

Justice STEWART, concurring in the judgment.

I cannot join the opinion of the Court. To hold, as the Court does, that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications. The paradigm of its violation is ... classification by race.

Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates "classifications" in the equal protection sense strikes me as little short of fantasy. The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.
Justice POWELL, concurring in the judgment.

I concur in the judgment of the Court that Wisconsin's restrictions on the exclusive means of creating the marital bond, erected by Wis. Stat. §§ 245.10(1), (4), and (5) (1973), cannot meet applicable constitutional standards. I write separately because the majority's rationale sweeps too broadly in an area which traditionally has been subject to pervasive state regulation. The Court apparently would subject all state regulation which "directly and substantially" interferes with the decision to marry in a traditional family setting to "critical examination" or "compelling state interest" analysis. Presumably, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." The Court does not present, however, any principled means for distinguishing between the two types of regulations. Since state regulation in this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.

Justice STEVENS, concurring in the judgment.

A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship. The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection. See Whalen v. Roe, 429 U.S. 589, 599-600 [(1977)]. It is not, however, an interest which is constitutionally immune from evenhanded regulation. Thus, laws prohibiting marriage to a child, a close relative, or a person afflicted with venereal disease, are unchallenged even though they "interfere directly and substantially with the right to marry." This Wisconsin statute has a different character.

Under this statute, a person's economic status may determine his eligibility to enter into a lawful marriage. A noncustodial parent whose children are "public charges" may not marry even if he has met his court-ordered obligations. Thus, within the class of parents who have fulfilled their court-ordered obligations, the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented, as well as inconsistent with our tradition of administering justice equally to the rich and to the poor.

Justice REHNQUIST, dissenting.

I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the "rational basis test," Dandridge v. Williams, 397 U.S. 471, 485 (1970), and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955); Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring). The statute so viewed is a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions.
Later cases have followed the distinction in *Zablocki* between substantial and less than substantial burdens. For example, in *Turner v. Safley*\(^{20}\) the Court considered a ban on the right to marry of a prisoner. Because the law recognizes that prisoners forfeit many rights that law-abiding citizens enjoy, this ban was not viewed as a substantial burden on the right to marry triggering strict scrutiny. Instead, the Court applied a “reasonableness” test. Even under this test, the absolute ban on marriage was held unconstitutional as “unreasonably” broad. In contrast, standard administrative regulations surrounding marriage are routinely upheld under a “reasonableness” analysis.\(^{21}\)

In *Loving v. Virginia*,\(^{22}\) excerpted at § 20.3, the Court held that a Virginia statute banning marriage between whites and non-whites was unconstitutional as a violation of the Equal Protection Clause under race discrimination analysis. In addition, the Court stated: “These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.”

The Court extended the fundamental right to marry to same-sex couples in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Consistent with the analysis at § 25.1 nn.8-10, the formalist and Holmesian Justices in dissent focused on the “history and traditions” language in *Washington v. Glucksberg*’s definition of fundamental rights, 521 U.S. at 721, to hold no fundamental right was implicated in *Obergefell*.\(^{id}\) at 2611-12 (Roberts, C.J., joined by Scalia & Thomas, JJ., dissenting) (courts should not create constitutional rights, but leave “decisionmaking to the people”); \(^{id}\) at 2640 (Alito, J., dissenting) (if right is not part of “history and tradition” courts should not create such rights). The majority’s view was the “generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of liberty in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” \(^{id}\) at 2598. In this case, a “better informed understanding of how constitutional imperatives define liberty” sees that the reasons behind the right to marry – “individual autonomy”; supporting a stable “two-person union”; “safeguard[ing] children and families”; and participating in a “keystone of our social order” – apply equally to same-sex couples. \(^{id}\) at 2599-2602. The court restricted the “history and traditions” language of *Glucksberg* to its facts, \(^{id}\) at 2602, but could have noted *Glucksberg* speaks of rights “fundamental to our concept of constitutionally ordered liberty,” 521 U.S. at 727, that “concept” definable by the majority’s “better informed understanding.”


\(^{21}\) *See, e.g.*, Greenberg v. Kimmelman, 494 A.2d 294, 304-05 (N.J. 1985) (ban on casino employment by “any member of the immediate family of any State officer or employee, or person [including] full-time member of the Judiciary” constitutional as “reasonable.”).

\(^{22}\) 388 U.S. 1, 5 n.4, 9-11 (1967) (citations omitted).
2. Right to Establish a Home

Moore v. City of East Cleveland
431 U.S. 494 (1977)

Justice POWELL announced the judgment of the Court, and delivered an opinion in which Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. § 1351.02. But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. § 1341.08. Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John came to live with his grandmother and with the elder and younger Dale Moores after his mother's death.

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a $25 fine. The Ohio Court of Appeals affirmed after giving full consideration to her constitutional claims, and the Ohio Supreme Court denied review. The city argues that our decision in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), we sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from Belle Terre. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." 416 U.S., at 9. East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither Belle Terre nor Euclid governs; the usual judicial deference to the legislature is inappropriate. "This Court has long
recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974). A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Of course, the family is not beyond regulation. See Prince v. Massachusetts, supra, at 166. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." Griswold v. Connecticut, 381 U.S., at 501 (Harlan, J., concurring). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home.

Justice STEVENS, concurring in the judgment.

In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit.
There appears to be no precedent for an ordinance which excludes any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis. Nor does there appear to be any justification for such a restriction on an owner's use of his property. The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins. Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property — that of an owner to decide who may reside on his or her property — it must fall under the limited standard of review of zoning decisions which this Court preserved in *Euclid* and *Nectow*. Under that standard, East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation.

For these reasons, I concur in the Court's judgment.

Chief Justice BURGER, dissenting.

It is unnecessary for me to reach the difficult constitutional issue this case presents. Appellant's deliberate refusal to use a plainly adequate administrative remedy provided by the city [Ed.: that remedy detailed in Justice Stewart's dissent below] should foreclose her from pressing in this Court any constitutional objections to the city's zoning ordinance. Considerations of federalism and comity, as well as the finite capacity of federal courts, support this position. In courts, as in hospitals, two bodies cannot occupy the same space at the same time; when any case comes here which could have been disposed of long ago at the local level, it takes the place that might well have been given to some other case, in which there was no alternative remedy.

The doctrine of exhaustion of administrative remedies has a long history. Though its salutary effects are undisputed, they have often been casually neglected, due to the judicial penchant of honoring the doctrine more in the breach than in the observance. For my part, the time has come to insist on enforcement of the doctrine whenever the local or state remedy is adequate and where asserted rights can be protected and irreparable injury avoided within the administrative process. Only by so doing will this Court and other federal courts be available to deal with the myriad new problems clamoring for resolution.

Justice STEWART, with whom Justice REHNQUIST joins, dissenting.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 [(1974)], the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single-housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment or infringe any other rights or freedoms protected by the Constitution.
The *Belle Terre* decision thus disposes of the appellant's contentions to the extent they focus not on her blood relationships with her sons and grandsons but on more general notions about the "privacy of the home." Her suggestion that every person has a constitutional right permanently to share his residence with whomever he pleases, and that such choices are "beyond the province of legitimate governmental intrusion," amounts to the same argument that was made and found unpersuasive in *Belle Terre*.

To be sure, the ordinance involved in *Belle Terre* did not prevent blood relatives from occupying the same dwelling, and the Court's decision in that case does not, therefore, foreclose the appellant's arguments based specifically on the ties of kinship present in this case. Nonetheless, I would hold, for the reasons that follow, that the existence of those ties does not elevate either the appellant's claim of associational freedom or her claim of privacy to a level invoking constitutional protection.

Even though the Court's previous cases are not directly in point, the appellant contends that the importance of the "extended family" in American society requires us to hold that her decision to share her residence with her grandsons may not be interfered with by the State. This decision, like the decisions involved in bearing and raising children, is said to be an aspect of "family life" also entitled to substantive protection under the Constitution. Without pausing to inquire how far under this argument an "extended family" might extend, I cannot agree. When the Court has found that the Fourteenth Amendment placed a substantive limitation on a State's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed "implicit in the concept of ordered liberty." See Roe v. Wade, supra, at 152, quoting Palko v. Connecticut, 302 U.S. 319, 325. The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

In this connection the variance provisions of East Cleveland's Building Code assume special significance, for they show that the city recognized the difficult problems its ordinances were bound to create in particular cases, and provided a means to solve at least some of them. Section 1311.01 of the Code establishes a Board of Building Code Appeals. Section 1311.02 then provides, in pertinent part: "The Board of Building Code Appeals shall determine all matters properly presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as the Board of Appeals, such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City."

The appellant did not request a variance under this section, although she could have done so. While it is impossible to know whether such a request would have been granted, her situation appears to present precisely the kind of "practical difficulties" and "unnecessary hardships" that the variance provisions were designed to accommodate.
This is not to say that the appellant was obligated to exhaust her administrative remedy before
defending this prosecution on the ground that the single-family occupancy ordinance violates the
Equal Protection Clause. In assessing her claim that the ordinance is "arbitrary" and "irrational,"
however, I think the existence of the variance provisions is particularly persuasive evidence to the
contrary. The variance procedure, a traditional part of American land-use law, bends the straight
lines of East Cleveland's ordinances, shaping their contours to respond more flexibly to the hard
cases that are the inevitable byproduct of legislative linedrawing.

For these reasons, I think the Ohio courts did not err in rejecting the appellant's constitutional
claims. Accordingly, I respectfully dissent.

Justice WHITE, dissenting.

The Fourteenth Amendment forbids any State to "deprive any person of life, liberty, or property,
without due process of law," or to "deny to any person within its jurisdiction the equal protection
of the laws." Both provisions are invoked in this case in an attempt to invalidate a city zoning
ordinance.

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than
a procedural dimension, we must always bear in mind that the substantive content of the Clause is
suggested neither by its language nor by preconstitutional history; that content is nothing more than
the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is
not to suggest, at this point, that any of these cases should be overruled, or that the process by which
they were decided was illegitimate or even unacceptable, but only to underline Justice Black's
constant reminder to his colleagues that the Court has no license to invalidate legislation which it
thinks merely arbitrary or unreasonable. And no one was more sensitive than Mr. Justice Harlan to
any suggestion that his approach to the Due Process Clause would lead to judges "roaming at large
in the constitutional field." Griswold v. Connecticut, supra, at 502. No one proceeded with more
care than he did when the validity of state or federal legislation was challenged in the name of
the Due Process Clause.

This is surely the preferred approach. That the Court has ample precedent for the creation of new
constitutional rights should not lead it to repeat the process at will. The Judiciary, including this
Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made
constitutional law having little or no cognizable roots in the language or even the design of the
Constitution. Realizing that the present construction of the Due Process Clause represents a major
judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the
underpinning for the broad, substantive application of the Clause disappeared in the conflict between
the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant
to breathe still further substantive content into the Due Process Clause so as to strike down
legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it
unavoidably pre-empts for itself another part of the governance of the country without express
constitutional authority.
Under our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the claim made here be sustained. I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause. To say that one has a personal right to live with all, rather than some, of one's grandchildren and that this right is implicit in ordered liberty is, as my Brother Stewart says, "to extend the limited substantive contours of the Due Process Clause beyond recognition." Ibid. The present claim is hardly one of which it could be said that "neither liberty nor justice would exist if [it] were sacrificed." Palko v. Connecticut, 302 U.S., at 326.

3. Right to Raise Children

Stanley v. Illinois
405 U.S. 645 (1972)

Justice WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. In re Stanley, 256 N.E.2d 814 (1970).

Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children. We granted certiorari, 400 U.S. 1020 (1971), to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers – whether divorced, widowed, or separated – and mothers – even if unwed – the benefit of the presumption that they are fit to raise their children.

We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.
The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed “essential,” Meyer v. Nebraska, 262 U.S. 390, 399 (1923), “basic civil rights of man,” Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and “[r]ights far more precious . . . than property rights,” May v. Anderson, 345 U.S. 528, 533 (1953). “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, 262 U.S. at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, 316 U.S., at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968). “To say that the test of equal protection should be the ‘legal’ rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such ‘legal’ lines as it chooses.” Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 75-76 (1968).

These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial.

In Bell v. Burson, 402 U.S. 535 (1971), we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme. Illinois would avoid the self-contradiction that rendered the Georgia license suspension system invalid by arguing that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Justice POWELL and Justice REHNQUIST took no part in the consideration or decision of this case. [Ed.: Having just joined the Court, they were not able to participate in all of the Court’s deliberations, and thus under Court practice took no part in the case.]
Chief Justice BURGER, with whom Mr. Justice BLACKMUN concurs, dissenting.

Quite apart from the religious or quasi-religious connotations that marriage has—and has historically enjoyed—for a large proportion of this Nation's citizens, it is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them. Stanley and the mother of these children never entered such a relationship. The record is silent as to whether they ever privately exchanged such promises as would have bound them in marriage under the common law. See Cartwright v. McGown, 12 N.E. 737, 739 (1887). In any event, Illinois has not recognized common-law marriages since 1905. Ill. Rev. Stat., c. 89, § 4. Stanley did not seek the burdens when he could have freely assumed them.

Where there is a valid contract of marriage, the law of Illinois presumes that the husband is the father of any child born to the wife during the marriage; as the father, he has legally enforceable rights and duties with respect to that child. When a child is born to an unmarried woman, Illinois recognizes the readily identifiable mother, but makes no presumption as to the identity of the biological father. It does, however, provide two ways, one voluntary and one involuntary, in which that father may be identified. First, he may marry the mother and acknowledge the child as his own; this has the legal effect of legitimating the child and gaining for the father full recognition as a parent. Ill. Rev. Stat., c. 3, § 12, subd. 8. Second, a man may be found to be the biological father of the child pursuant to a paternity suit initiated by the mother; in this case, the child remains illegitimate, but the adjudicated father is made liable for the support of the child until the latter attains age 18 or is legally adopted by another. Ill. Rev. Stat., c. 106 3/4, § 52.

Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother. He contends that he consequently must be treated the same as a married father of legitimate children. Even assuming the truth of Stanley's allegations, I am unable to construe the Equal Protection Clause as requiring Illinois to tailor its statutory definition of ‘parents’ so meticulously as to include such unusual unwed fathers, while at the same time excluding those unwed, and generally unidentified, biological fathers who in no way share Stanley's professed desires.

Indeed, the nature of Stanley's own desires is less than absolutely clear from the record in this case. Shortly after the death of the mother, Stanley turned these two children over to the care of a Mr. and Mrs. Ness; he took no action to gain recognition of himself as a father, through adoption, or as a legal custodian, through a guardianship proceeding. Eventually it came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children; it was only then that the dependency proceeding here under review took place and that Stanley made himself known to the juvenile court in connection with these two children. Even then, however, Stanley did not ask to be charged with the legal responsibility for the children. He asked only that such legal responsibility be given to no one else. He seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children.
Not only, then, do I see no ground for holding that Illinois' statutory definition of “parents” on its face violates the Equal Protection Clause; I see no ground for holding that any constitutional right of Stanley has been denied in the application of that statutory definition in the case at bar.

As Mr. Justice Frankfurter once observed, “Invalidating legislation is serious business. . . .” Morey v. Doud, 354 U.S. 457, 474 (1957) (dissenting opinion). The Court today pursues that serious business by expanding its legitimate jurisdiction beyond what I read in 28 U.S.C. § 1257 as the permissible limits contemplated by Congress. In doing so, it invalidates a provision of critical importance to Illinois' carefully drawn statutory system governing family relationships and the welfare of the minor children of the State. And in so invalidating that provision, it ascribes to that statutory system a presumption that is simply not there and embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible.

Modern cases have struggled with the rights of unmarried persons to raise their children. These cases typically involve unwed fathers. The critical fact in these cases appears to be the extent to which the father had established or had tried to establish a relationship with the child. Where the father had established such a relationship, a fundamental right to raise that child is usually held to exist. Where no such relationship existed, the courts typically hold no fundamental right is implicated, and thus apply minimum rationality review applicable to standard social or economic regulation.

Because in many cases the unwed mother is given greater rights than the unwed father, a number of these fundamental rights cases were brought under the Equal Protection Clause. For example, as indicated in Stanley v. Illinois,23 excerpted above, the Court held equal protection is denied by a statute which, on death of the mother, made the child a ward of the state without giving the father a hearing on fitness before the child was removed from his custody. If the father has lived with the child, equal protection is denied if the mother can block adoption, but the father can not.24

Such a discriminatory classification could be applied, however, where the father had not lived with the mother, did not have custody of the child, had not sought custody, and the adoption by the mother’s husband recognized a family unit already in existence.25 And a state may permit a mother, but not an unwed father, to sue for the wrongful death of the child where the father had taken no steps to legitimate the child.26

Other cases have involved more of a straightforward Due Process Clause review. For example, in *Lehr v. Robertson,* it was not a denial of due process to grant an adoption without notice to the putative father, even though his whereabouts were known, if the father had not established any relationship with the child prior to the adoption proceeding, or registered with a “putative father registry,” or name was not on the child’s birth certificate.

In the most noteworthy post-instrumentalist case, *Michael H. v. Gerald D.*, the Court upheld a denial of visitation rights to the father of an unwed child who for some time lived with the mother and child. Subsequent to that time, however, the mother had reconciled with her husband and was living with him. Justice Scalia wrote for a plurality that if a mother lives with her husband and seeks to preserve her marriage, a state may apply a conclusive presumption that her children are legitimate and, thus, may dismiss an action by a putative father to establish paternity and obtain visitation rights. The plurality held that the putative father lacked a fundamental liberty interest in his relationship with the child that would require application of a “best interest of the child” test. In reaching this determination, Justice Scalia noted in footnote 6 of his opinion that he preferred to consider “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” This reflects a formalist focus on specific historical traditions.

Justices O'Connor and Kennedy concurred in all but footnote 6 of Justice Scalia's opinion. Demonstrating their respect for precedent, they noted that the Court has characterized relevant traditions protecting asserted fundamental rights at levels of generality that might not be the most specific level available. Justice Stevens concurred, but only because he read the record to indicate that the trial court had considered all the facts and made a decision in light of the “best interests of the child,” granting the putative father the standard he sought anyway.

Justice Brennan, dissenting with Justices Marshall and Blackmun, said that a biological link plus a substantial parent-child relationship, establishes a constitutionally protected interest in parenthood, and parenthood is a fundamental interest. Justice White, dissenting with Justice Brennan, said that he read the precedents to hold that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child. To protect that interest he should be given a hearing on that matter rather than having the child conclusively presumed to be that of the mother's husband, as was done here under California law. For these four Justices in dissent, the putative father in *Michael H.* was more like the father in *Stanley* than the father in *Lehr.*


29 *Id.* at 132 (O’Connor, J., joined by Kennedy, J., concurring in part); *id.* at 135-36 (Stevens, J., concurring in the judgment).

30 *Id.* at 137-47 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting); *id.* at 157-58, 163 (White, J., joined by Brennan, J., dissenting).
Despite this ruling, some state Supreme Courts, under their own state Constitutions, have granted biological fathers constitutionally protected rights, both in cases similar to *Michael H.*, and in cases where the biological father wished to contest the mother’s desire to give up the child for adoption.  

As a matter of statutory law in state Family Codes, virtually all states today would give the father in circumstances like *Michael H.* statutory rights, as well as responsibilities for support. Modern DNA technology has rendered irrelevant “presumptions” of paternity, since paternity can be established with great accuracy in most cases. Thus, today, biological parentage, not marital status, determines in most states who has rights to sue for custody or visitation under the “best interest of the child” standard. Thus, in practice, the position of the dissent in *Michael H.* is now the law as a statutory matter, even though as a constitutional matter *Michael H.* is still good law.  

Modern cases involving the rights of parents to raise children have implicitly applied a “substantial burden” versus “less than substantial burden” analysis. For example, in *Alfonso v. Fernandez,* a court considered a condom-distribution program to children at public schools that did not have a voluntary opt-out provision for parents who wished their children not to have access to the program. Faced with this greater burden on parental rights, the court applied a strict scrutiny approach to this burden on their fundamental right to raise their child. In contrast, in *Parents United for Better Schools, Inc. v. School District of Philadelphia,* the condom distribution program had a voluntary opt-out provision for parents who did not wish their child to participate in the program. Faced with this lesser burden on parental rights, the court applied only reasonableness review. 

When the issue involved is merely providing information, not providing services, courts usually hold that schools may provide information, including information about sexual matters, without parental consent. This may be done either by holding that providing such information does not burden any fundamental “child-rearing” right at all, and thus minimum rationality review for social or economic regulation applies, or by holding that any burden is only minor, and the program is constitutional.
under reasonableness review. In addition, while the Supreme Court has held that a state may not forbid parents from attempting to educate their children in accordance with their beliefs, this right does not extend to preventing states from providing certain information or services to minors without parental participation. For example, in 1980, a federal court of appeals upheld a Michigan Health Department's provision of contraceptive information and services to minors without parental notification. The court noted, “There is no requirement that the children of the plaintiffs avail themselves of the services offered by the Center and no prohibition against the plaintiffs' participating in decisions of their minor children on issues of sexual activity and birth control.” Indeed, outside the school context, numerous courts have held that parental notice requirements in the context of contraception and family planning services are inconsistent with Title X of the Public Health Service Act, which is viewed as imposing a burden of confidentiality on providers of such services. States are usually viewed as having a compelling interest to require life-saving treatment for children when their parent’s religious beliefs object to such medical treatment, although many states have exceptions to child-endangerment laws for parents with religious objections.

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35 See, e.g., Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207-11 (9th Cir. 2005) (school distributed survey to students on sexual topics without parental consent constitutional under minimum rational review); C.N. v. Ridgewood Board of Education, 430 F.3d 159, 182-85 & n.26 (3rd Cir. 2005) (school distributed survey to students on sexual topics without parental consent constitutional as minor infringement “not of comparable gravity to those protected under existing Supreme Court precedent”).

36 See, e.g., Wisconsin v. Yoder, 406 U.S. 225, 232-34 (1972) (compulsory high school education unconstitutional as applied to Amish minors); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (compulsory education within the public school system unconstitutional); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (statute banning teaching foreign languages unconstitutional). For discussion of the issues surrounding regulation of the educational content of “home-schooling” programs, which generally are viewed as not burdening the fundamental right of “child-rearing,” and thus trigger only minimum rational review, unless the regulations provide different rules based upon “religious beliefs,” which would raise Establishment or Free Exercise Clause problems, see Laura J. Bach, For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment, 38 Val. U.L. Rev. 1337 (2004).


4. Right to Procreate and Right Not to Procreate

The issue of whether there is a right to procreate, as in Skinner, excerpted at § 25.3, there is a right not to procreate through access to contraception was first raised in 1961 in Poe v. Ullman. In Poe, a majority of the Court held the case was not ripe for resolution, as noted at § 4.1 n.5. Justice Frankfurter’s plurality opinion noted, “The Connecticut law prohibiting the use of contraceptives has been on the State’s books since 1879. During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in [one test case] in 1940. . . . We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage – the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed.”

Faced with this result, plaintiff Dr. Buxton in Poe arranged to get himself and another arrested, and thus create an injury-in-fact to satisfy standing and ripeness doctrine. In his majority opinion in 1965 in Griswold v. Connecticut, Justice Douglas used both aspects of “penumbral” and “analogical” reasoning, discussed in this Chapter at § 25.1 nn.11-13, to support the view that there is an unenumerated fundamental right of a married couple to contraception.

Griswold v. Connecticut
381 U.S. 479 (1965)

Justice DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven – a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved . . . are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Section 54-196 provides: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

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The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A. 2d 479. We noted probable jurisdiction. 379 U.S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship [Ed.: They had their own Article III standing based on their arrest and fine; they could raise the rights of married people under third-party standing doctrine addressed at § 3.4.2].

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Williamson v. Lee Optical Co.*, 348 U.S. 483. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, supra, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Martin v. Struthers, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see Wieman v. Updegraff, 344 U.S. 183, 195) – indeed the freedom of the entire university community. Sweezy v. New Hampshire, 354 U.S. 234, 249-250, 261-263; Barenblatt v. United States, 360 U.S. 109, 112; Baggett v. Bullitt, 377 U.S. 360, 369. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. NAACP v. Button, 371 U.S. 415, 430-431. In *Schware v. Board*
of Bar Examiners, 353 U.S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (id., at 244) and was not action of a kind proving bad moral character. Id., at 245-246.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522 [(1961) (Harlan, J., dissenting)]. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.
Justice GOLDBERG, whom THE CHIEF JUSTICE and Justice BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments (see my concurring opinion in Pointer v. Texas, 380 U.S. 400, 410), I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court's holding.

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

While this Court has had little occasion to interpret the Ninth Amendment, "it cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." Myers v. United States, 272 U.S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (Emphasis added.)
A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." With all due respect, I believe that it misses the import of what I am saying.

The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment – and indeed the entire Bill of Rights – originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." Powell v. Alabama, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe v. Ullman, 367 U.S. 497, 517 (dissenting opinion of Justice Douglas).

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern – the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see Tileston v. Ullman, 26 A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. . . . The State of
Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. §§ 53-218, 53-219 et seq. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." NAACP v. Alabama, supra, at 307. See McLaughlin v. Florida, supra, at 196.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in Poe v. Ullman, supra, at 553. "Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

Justice HARLAN, concurring in the judgment.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

[Ed.: In Poe v. Ullman, 367 U.S. 497, 542, 554-55 (1961) (Harlan, J., dissenting), Justice Harlan had written: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

. . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.
But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime.

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that “There are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality” of the individual. Skinner v. State of Oklahoma, supra (316 U.S. 535). In this instance these limits are, in my view, reached and passed.”] [Ed.: The focus on the “utter novelty of this enactment” underscores that the Connecticut statute was out-of-line with legislative practice, an important consideration, particularly for a Holmesian Justice.]

Justice WHITE, concurring in the judgment.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty.

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356; Skinner v. Oklahoma, 316 U.S. 535; Schware v. Board of Bar Examiners, 353 U.S. 232; McLaughlin v. Florida, 379 U.S. 184, 192.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require "strict scrutiny," Skinner v. Oklahoma, 316 U.S. 535, 541, and "must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Bates v. Little Rock, 361 U.S. 516, 524. See also McLaughlin v. Florida, 379 U.S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. Zemel v. Rusk, 381 U.S. 1.

As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530; Martin v. Walton, 368 U.S. 25, 28 (Douglas, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.
A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Justice BLACK, with whom Justice STEWART joins, dissenting.

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe – except their conclusion that the evil qualities they see in the law make it unconstitutional.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." . . . The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. . . . I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the
"traditions and (collective) conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "(collective) conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother Goldberg shows that the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out, were intended to be assigned into the hands of the General Government (the United States), and were consequently insecure." That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "(collective) conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subj ecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. [Ed.: Taking the
classic formalist position of a static Constitution absent formal amendment.] The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., Lochner v. New York, 198 U.S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, and many other opinions. See also *Lochner v. New York*, 198 U.S. 45, 74 (Holmes, J., dissenting).

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

Justice STEWART, whom Justice BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.
Justices Black and Stewart’s dissents in *Griswold* reflect the formalist perspective that the critical purpose of a Constitution is to be “static/anti-evolutionary,” and to reflect majoritarian sentiments in the absence of express constitutional limitations. From a natural law perspective, the purpose of a Constitution is to remove certain decisions from the majoritarian democratic process based on the natural rights that individuals have to be free from majoritarian prejudices. As has been noted:

> [T]he framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities. The body of the Constitution reflects a commitment to separation of powers and individual liberties (for example, no ex post facto laws or bills of attainder, no state impairment of the obligation of contracts, no congressional suspension of the writ of habeas corpus except in times of insurrection). Furthermore, as Justice Jackson eloquently stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.41

From this perspective, the protection of individual rights to liberty and equality are paramount. As stated in the Declaration of Independence, it is “to secure these rights” that “governments are instituted among men.” From that perspective, it would be counterproductive to adopt a Constitution based upon a “static” model of interpretation, since that model would allow for moral progress only when the democratic majority decided to adopt the more enlightened interpretation of the natural law principle. Yet, the whole point of enacting that natural law constitutional provision was to remove that decision from democratic decisionmaking.

For example, when judges, post-1954, have adopted more enlightened interpretations of equal protection and due process to create advances in race relation cases, discussed in Chapters 20-21; gender discrimination cases, discussed in Chapter 22; and cases involving sexual orientation, discussed at § 23.4.3, they have acted consistent with a natural law understanding of those concepts. For the Court to have sat on the sidelines and hoped for the legislative and executive processes alone to deal with those matters would have been a betrayal of what those natural law principles were about. For the most part, the Court did sit on the sidelines on those issues during the formalist and Holmesian eras, from 1873-1954, with little moral progress made on those issues during that time. The major exception to this lack of progress was women being granted the right to vote in 1920,

which was the product of an enormous and sustained social movement,\textsuperscript{42} and not equaled with respect to the Equal Rights Amendment in the 1970s, as noted at § 22.1 nn.11-12.\textsuperscript{43}

Further, as has been noted, “The federal constitution is a product of the Enlightenment. It manifests a qualified optimism about the power of government to improve society . . . . The powers delegated to all three branches of the federal government can grow to meet future needs.”\textsuperscript{44} On the assumption that the document would be interpreted in light of a natural law style of interpretation, which would permit such growth in light of purpose, legislative and executive practice, and reasoned elaboration of precedents, drafting a formal amendment process that is relatively difficult makes sense.

In contrast, from a formalist perspective, the literal text of the Constitution would need to be much longer and more detailed. Provisions for formal amendment would likely be drafted to be somewhat easier, since formal amendment would be the primary means of adjusting the Constitution to new realities. For example, the State of Texas Constitution, drafted in 1876, during the formalist era, is long and detailed. It contains over 60,000 words, and thus is six times as long as the United States Constitution. As has been noted, “Designed for a largely rural, agrarian state with less than a million inhabitants and no oil industry, the Texas Constitution has endured to govern [a] largely urban and industrialized state only because it is relatively easy to amend . . . , encrusted with 326 amendments [as of 1990, and still counting].” To amend the Texas Constitution, the amendment must be proposed by a joint resolution of the legislature, must receive a two-thirds vote in each house, but must carry only a simple majority of the voters at an election.\textsuperscript{45} To encrust a formalist, static model of interpretation, requiring greater resort to the formal amendment process, onto a document, like the United States Constitution, whose amendment provisions were not drafted with such a model of interpretation in mind, since it is not likely the framers were formalists, as noted at § 1.4 n.56, frustrates both the intent of the framers and ratifiers, and well as making little practical sense in terms of social policy arguments that might be used to support such a static model of interpretation.

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\textsuperscript{42} Thomas E. Baker, \textit{Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution}, 10 Widener J. Pub. L. 1, 116-17 (2000) (“According to the account of one of the historic champions of the Nineteenth Amendment, the effort to guarantee women the franchise took 72 years and included 56 state-referenda campaigns, 480 state-legislative campaigns, 47 state-constitutional conventions, 277 state-party conventions, 30 national-party conventions, and 19 campaigns before 19 successive Congresses – just to get the measure before the states for ratification.”). Women’s roles during World War I, both in factories at home and serving in support services for troops abroad, also helped push the Nineteenth Amendment to successful ratification.

\textsuperscript{43} On the race, gender, and sexual orientation cases generally during the 20th century, see William N. Eskridge, Jr., \textit{Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century}, 100 Mich. L. Rev. 2062 (2002).


\textsuperscript{45} \textit{Id.} at 1339 & n.16.
Seven years after *Griswold*, in 1972, the Court held in *Eisenstadt v. Baird* that *Griswold* could be extended to cover the distribution to, and use of, contraceptives by unmarried couples. The Court noted, “[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Justices White and Blackmun concurred in the result, noting that since nothing in the record indicated whether the accused person was distributing to married persons or single individuals, there was no need to address the issue of extending *Griswold* to single individuals, since *Griswold* protected the right to distribute to married persons. Chief Justice Burger dissented on the ground that since the case involved “dispensing medicinal material without a license,” it did not implicate *Griswold* at all, which involved dispensing by a doctor. Thus minimum rationality review should be applied, and the law was rationally related to a legitimate state interest that, as a health measure, contraceptives should be distributed by a physician or pursuant to a physician’s prescription.

The majority’s conclusion in *Eisenstadt* is based both on “analogical” reasoning that if there is a fundamental right to marry, there must be as a matter of “decisional privacy” a fundamental right not to marry, and thus not have marital status determine the existence of fundamental rights. It is also based on the text of the Equal Protection and Due Process Clauses that they protect “persons,” not “married couples.”

One year after *Eisenstadt*, in 1973, the Court decided *Roe v. Wade*, excerpted at § 26.1. There the Court held that the right of privacy, already extended in the precedents to activities relating to marriage, procreation, and contraception, was broad enough to encompass a woman's decision on whether or not to terminate her pregnancy.

The decision in *Roe* was supported by reference to arguments of history, legislative and executive practice, reasoned elaboration of precedent, and prudential considerations of social policy. An informed reader should note the Court’s discussion of each. Once the individual’s decision to have an abortion was viewed as a fundamental right, the Court then applied a strict scrutiny approach.

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46 405 U.S. 438, 453 (1972). As in *Stanley v. Illinois*, excerpted at § 25.4.3, Justices Powell and Rehnquist had just joined the Court and thus were not able to participate in all of the Court’s deliberations, and thus under Court practice took no part in the consideration or decision in the case.

47 *Id.* at 463-65 (White, J., joined by Blackmun, J., concurring in the result).

48 *Id.* at 465-66, 471-72 (Burger, C.J., dissenting).

Under a strict scrutiny approach, the Court noted that at some point in pregnancy the state's legitimate interests in safeguarding maternal health and protecting potential life from the moment of conception become sufficiently compelling to sustain regulation of the abortion decision under a strict scrutiny approach. Of course, under strict scrutiny, such regulations must be directly related to advancing that compelling interest, and be the least restrictive effective means of regulation.

In 2002, the Ninth Circuit Court of Appeals considered in Gerber v. Hickman⁵⁰ whether a prisoner had a fundamental right to procreate that would be infringed by the refusal of the prison’s warden to send a sample of his sperm to his wife for artificial insemination. Although acknowledging that prisoners have a fundamental right not to be sterilized, as in Skinner v. Oklahoma, excerpted at § 25.3, and a fundamental right to marry, as in Turner v. Safley, discussed at § 25.4.1 n.21, a 6-5 en banc majority of the Ninth Circuit held that prisoners have no fundamental right in this context, as recognition of such a right would be “inconsistent” with the status of being a prisoner. Perhaps a better argument, based on “reasoned elaboration of the law” through “analogical reasoning,” would have been to recognize such a right, as did the en banc dissent, but then to ask, as in Turner v. Safley, whether the refusal by the warden was “reasonably related to penological objectives” as a less than substantial burden on a fundamental right – which it may, or may not, have been.

In applying such a “second-order reasonableness” balancing test, the Court does not give the same kind of “substantial deference” to legislative judgments that the Court gives at minimum rational review, discussed at § 19.1 n.26. However, that does not mean that the Court gives no deference at all. Despite the Court determining for itself whether the underlying policies are actually supported by fact, some deference to governmental judgment is still given. For example, in Thornburgh v. Abbott,⁵¹ the Court stated that while the Turner v. Safley “reasonableness” standard for determining marriage rights of prisoners “is not toothless,” “[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder.” In Gonzales v. Carhart,⁵² excerpted at § 26.4, the Court stated, “Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”

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⁵⁰ 291 F.3d 617, 621-22 (9th Cir. 2002) (6-5 en banc majority opinion); id. at 624-29 (Tashima, J., joined by Kozinski, Hawkins, Paez & Berzon, J.J., dissenting).


⁵² 550 U.S. 124, 165 (2007). See also Mathews v. Eldridge, 424 U.S. 319, 349 1976) (under procedural due process analysis “substantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs.”), excerpted at § 28.3; District of Columbia v. Heller, 554 U.S. 570, 690 (Breyer, J., joined by Stevens, Souter & Ginsburg, J.J., dissenting) (“In applying this kind of [reasonableness balancing] the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”).
CHAPTER 26: FUNDAMENTAL RIGHTS DOCTRINE AND ABORTION LAW


§ 26.3 Substantial Burdens on Abortion Rights in the Casey Era .......................... 1243

§ 26.4 Less Than Substantial Burdens on Abortion Rights in the Casey Era ............ 1247


The decision in Roe v. Wade was supported by arguments of history, and legislative, executive, and social practice – Part VI of the Court’s opinion – and reasoned elaboration of precedent, and prudential considerations of social policy – Part VIII. Under a strict scrutiny approach, the Court noted that at some point in pregnancy the state's legitimate interests in safeguarding maternal health and protecting potential life from the moment of conception – Part VII – become sufficiently compelling to sustain regulation of abortion under a strict scrutiny approach – Part X.

Roe v. Wade
410 U.S. 113 (1973)

Justice BLACKMUN delivered the opinion of the Court.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in Lochner v. New York, 198 U.S. 45, 76 (1905): “[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”

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I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code, Vernon's Ann. P.C. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev. Stat., c. 8, Arts. 536-541 (1879); Texas Rev. Crim. Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother."

II

Jane Roe [FN4: The name is a pseudonym], a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in Mitchell v. Donovan, 398 U.S. 427 (1970), and Gunn v. University Committee, 399 U.S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See Carter v. Jury Comm'n, 396 U.S. 320 (1970); Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73; 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. Doe v. Bolton, 410 U.S. 179 [(1973)].
The appellee notes . . . that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. United States v. Munsingwear, Inc., 340 U.S. 36 (1950); Golden v. Zwickler, supra; SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be “capable of repetition, yet evading review.” Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). [Ed.: that exception to mootness doctrine discussed at § 4.2 nn.27-28] See Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 178-179 (1968); United States v. W. T. Grant Co., 345 U.S. 629, 632-633 (1953).

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id., at 460 (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.
1. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, and that “it was resorted to without scruple.” The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.

2. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)–377(?) B.C.), who has been described as the Father of Medicine, the “wisest and the greatest practitioner of his art,” and the “most important and most complete medical personality of antiquity,” who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? The Oath varies somewhat according to the particular translation, but in any translation the content is clear: “I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,” or “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.”

Although the Oath is not mentioned in any of the principal briefs in this case . . . , it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, “echoes Pythagorean doctrines,” and “[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity.”

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) “give evidence of the violation of almost every one of its injunctions.” But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Phthagorean ethic. The Oath “became the nucleus of all medical ethics” and “was applauded as the embodiment of truth.” Thus, suggests Dr. Edelstein, it is “a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.” [Ed.: The Court’s cites in these two paragraphs are to: L. Edelstein, The Hippocratic Oath 12-18, 63-64 (1943)].

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3. The common law. It is undisputed that at common law, abortion performed before “quickening” – the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy – was not an indictable offense. The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became “formed” or recognizably human, or in terms of when a “person” came into being, that is, infused with a “soul” or “animated.” A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. This was “mediate animation.” Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

4. The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the “quickening” distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of “the life of a child capable of being born alive.” It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense “unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.”

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) “that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated,” or (b) “that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.” The Act also provides that, in making this determination, “account may be taken of the pregnant woman's actual or reasonably foreseeable environment.” It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion “is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.”
5. The American law. In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. . . . It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. Three States permitted abortions that were not “unlawfully” performed or that were not “without lawful justification,” leaving interpretation of those standards to the courts. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3, set forth as Appendix B to the opinion in Doe v. Bolton, 410 U.S. 205 [(1973)] [Ed.: That provision states, in part: Section 230.3. Abortion. (1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree. (2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. (Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.)]

[Ed.: The Court then considered the views of the American Medical Association, the American Public Health Association, and the American Bar Association, all of which in their current views reflected the liberalizing trend of the Model Penal Code]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.
A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal “abortion mills” strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest – some phrase it in terms of duty – in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) [Ed.: (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”)], the Court has recognized that a right
of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485; in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454; id., at 460, 463-465 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Where certain “fundamental rights” are involved, the Court has held that regulation limiting these rights may be justified only by a “compelling state interest,” Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485; Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308 (1940); see Eisenstadt v. Baird, 405 U.S., at 460, 463-464 (White, J., concurring in result).

IX

A. The appellee and certain amici argue that the fetus is a “person” within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of
course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define “person” in so many words. Section 1 of the Fourteenth Amendment contains three references to “person.” The first, in defining “citizens,” speaks of “persons born or naturalized in the United States.” The word also appears both in the Due Process Clause and in the Equal Protection Clause. “Person” is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.

All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have
taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes “viable,” that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of “mediate animation,” that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this “ensoulment” theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a “process” over time, rather than an event, and by new medical techniques such as menstrual extraction, the “morning-after” pill, implantation of embryos, artificial insemination, and even artificial wombs.

With respect to the State's important and legitimate interest in the health of the mother, the “compelling” point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above [Part VII], that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those “procured or attempted by medical advice for the purpose of saving the life of the mother,” sweeps too broadly. The statute makes no distinction between abortions performed early in
pregnancy and those performed later, and it limits to a single reason, “saving” the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Chief Justice BURGER, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context. See United States v. Vuitch, 402 U.S. 62, 71-72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.
Justice STEWART, concurring.

In 1963, this Court, in *Ferguson v. Skrupa*, 372 U.S. 726 [(1963)], purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: “We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” Id., at 730. [FN 1: Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733.]

 Barely two years later, in *Griswold v. Connecticut*, 381 U.S. 479 [(1965)], the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the “liberty” that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 12; *Griswold v. Connecticut*, supra; *Pierce v. Society of Sisters*, supra; *Meyer v. Nebraska*, supra. See also *Prince v. Massachusetts*, 321 U.S. 158, 166; Skinner v. Oklahoma, 316 U.S. 535, 541. As recently as last Term, in *Eisenstadt v. Baird*, 405 U.S. 438, 453 [(1972)], we recognized “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. “Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U.S. 390 (1923).” *Abele v. Markle*, 351 F.Supp. 224, 227 (D.C.Conn.1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause.

Justice WHITE, with whom Justice REHNQUIST joins, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons – convenience, family planning, economics, dislike of children, the
embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

Justice REHNQUIST, dissenting.

To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 22, §§ 14, 16. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and “has remained substantially unchanged to the present time.”

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

The history cited by the Court in Part VI supported recognizing a right to have an abortion early in pregnancy. Perhaps for this reason, formalist Chief Justice Burger concurred in Roe, although the formalist reluctance to engage in unenumerated fundamental rights analysis absent clear specific historical intent of the framers and ratifiers or clear specific traditions has supported formalists Justice Scalia and Thomas rejecting Roe and calling for it to be overruled, as noted at § 26.2 n.12, summarizing Planned Parenthood v. Casey, excerpted at § 26.2. The fact that a sizable number of
states as a matter of legislative and executive practice banned abortion between 1868 and 1973 formed the basis of Justices White’s and Rehnquist’s Holmesian dissents in the case, given the Holmesian great deference to legislative and executive practice. It was easier for the liberal instrumentalists on the Court to support Roe, since arguments of history and social practice reflected in the views of the Model Penal Code, the American Medical Association, and other groups, noted in Part VI, and the “right of privacy” precedents and prudential arguments of liberal social policy, noted in Part VIII, all tended to support the same result. Without resort to social policy, it is a closer call for a natural law judge based on history, practice, and precedent, as in the joint opinion of Justices O’Connor, Kennedy, and Souter in Planned Parenthood v. Casey, excerpted at § 26.2.

After the decision in Roe v. Wade, the Court decided a large number of cases in which it spelled out various implications and corollaries of the fundamental right identified in Roe. For example, even under strict scrutiny review, the Court indicated that all abortions after the first trimester could be required to be in a licensed hospital, where "hospital" included outpatient surgical clinics, and a second physician could be required at the abortion of a viable fetus to attempt to save its life when no delay occurs from that requirement which would increase the risk to the mother’s health.1 On the other hand, many laws were held not to satisfy strict scrutiny. Regarding the surgical procedure itself, these included: abortion must be approved by more than one physician; saline amniocentesis cannot be used after the first 12 weeks of pregnancy; physicians must use the same care to preserve fetal life as if a live birth was intended, even before viability; abortions after the first trimester must be in a full-service hospital; doctors must use an abortion technique that favors the fetus, unless it would pose significantly greater risk to maternal health; and a second physician requirement when viability is possible, with no exception for the mother's health when a second physician is delayed.2 Regarding related matters of abortion regulation, the Court held it was

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2 Doe v. Bolton, 410 U.S. 179, 199-200 (1973) (approval by more than one physician unconstitutional); Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976) (prohibition of saline amniocentesis abortions after the first 12 weeks of pregnancy unconstitutional); id. at 81-83 (same care to preserve fetal life as if a live birth was intended, even if fetus is not viable, unconstitutional); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 481-82 (1983) (unconstitutional to require physician to employ procedure that maximizes prospect of fetal survival on grounds that the state may not trade off a woman's life or health for the sake of the fetus); id. at 769-71 (second physician is required when viability is possible, with no exception for the mother's health when a second physician is delayed).
unconstitutional to require a wife to inform her husband before having an abortion; to require parental consent to a minor’s abortion, unless a medical emergency exists; to require a 24-hour waiting period after consent; to require the physician to tell the women that “an unborn child is a human life from the moment of conception”; to require that certain information must be provided in all cases regardless of whether in the physician’s judgment the information is relevant to her personal decision or whether certain risks are nonexistent for a particular patient; and to require physicians to file information in public records from which patients might be identified.3

Laws permitted under minimum rationality review because they were viewed as neutral laws not burdening abortion rights, and thus not triggering strict scrutiny, included: only physicians may perform abortions; women must provide written, informed consent; routine hospital records must be kept; states and the federal government can fund normal childbirth expenses, but refuse to reimburse for the cost of an abortion, and permissible to exempt abortion from laws reimbursing other medical costs; and all removed tissue must be sent to a pathologist.4

With respect to minors, the Court appeared to apply intermediate scrutiny, rather than strict scrutiny, because of three reasons: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in rearing.” Thus, laws that would be unconstitutional if applied to adults, like requiring notification or consent

3 Planned Parenthood v. Danforth, 428 U.S. 52, 67-71 (1976) (spousal consent provision unconstitutional); id. at 72-75 (parental consent requirement for minors with medical emergency exception, but no other judicial bypass procedure, unconstitutional); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444-45 (1983) (requiring that the physician tell the women that “the unborn child is a human life from the moment of conception” unconstitutional); id. at 445-46 (requiring that certain information must be provided in all cases regardless of whether in the physician deems it relevant unconstitutional); id. at 449-51 (mandatory 24-hour waiting period unconstitutional); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 760-66 (1986) (“much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether” and intrudes upon the discretion of the pregnant woman's physician and thereby imposes the “undesired and uncomfortable straitjacket”); id. at 766-68 (required Pennsylvania reports, while claimed not to be “public,” are available nonetheless to the public for copying and thus raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right to end a pregnancy).

4 Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (constitutional to require abortions be performed by physicians); Planned Parenthood v. Danforth, 428 U.S. 65-67 (1976) (provision requiring a woman's written consent to abortion constitutional); id. at 79-81 (reporting and record keeping requirements constitutional); Harris v. McRae, 448 U.S. 297, 325 n.27 (1980) (withholding federal funds under the Medicaid program to reimburse the costs of abortions, except where the life of the mother would be endangered if the fetus were carried to term, constitutional, even though the government would fund childbirth expenses under Medicaid); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 486-90 (1983) (requirement of a pathology report for each abortion performed).
of another person, may be constitutional if applied to minors if there is a “significant justification” – under intermediate review, an “important or substantial reason” – for the difference in treatment.5 Under this analysis, a parental consent law was held valid as long as it assured a prompt judicial hearing where the minor could avoid the consent requirement by demonstrating “that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.” A state can also ban abortion on an unmarried, unemancipated minor woman unless one, or both, parents are notified or a court approves through a judicial bypass alternative for circumstances where the minor is sufficiently mature or notifying her parents would not be in her best interests because of an abusive family environment or other reason.6

With respect to possible application of criminal laws to physicians performing abortions, the Court held void for vagueness a statute requiring physicians to attempt to preserve the life of an aborted fetus if there is "a sufficient reason to believe that the fetus may be viable." Physicians cannot be found criminally liable for aborting a viable fetus unless they know it is viable or in bad faith ignore facts regarding viability.7 Also too vague was a criminal statute which required physicians to dispose of fetal remains in a "humane and sanitary manner."8


In 1989, the Court was faced with an opportunity to overrule or dramatically limit Roe v. Wade in Webster v. Reproductive Health Services.9 In Webster, a 3-Justice plurality opinion of Chief Justice

5 Belloti v. Baird, 443 U.S. 622, 634 (1977) (listing these three reasons); Carey v. Population Services, Int’l, 431 U.S. 678, 693 & nn.15-16 (1977) (the law “has generally regarded minors as having a lesser capability for making important decisions” than adults, thus permitting different regulations for children with “sufficient justification”).

6 Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476, 490-93 (1983) (parental consent is constitutional, as long as option provided for judicial bypass); Hodgson v. Minnesota, 497 U.S. 417, 480-82 (1990) (Kennedy, J., joined by Rehnquist, C.J., and White & Scalia, JJ., concuring in the judgment in part and dissenting in part); id. at 461 (O’Connor, J., concurring in part and concurring in the judgment in part) (two-parent notification requirement constitutional, as long as judicial bypass option). On parental consent and notification laws, see generally 77 A.L.R. 5th 1 (2000).

7 Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (provision requiring the physician to exercise professional care to preserve the fetus' life and health on pain of criminal and civil liability was unconstitutional); Colautti v. Franklin, 439 U.S. 379, 388-90 (1979) (“good-faith” standard for viability determination required).


9 492 U.S. 490, 518-19 (1989) (plurality opinion of Rehnquist, C.J., joined by White & Kennedy, JJ.); id. at 532 (Scalia, J., concurring in part and concurring in the judgment).
Rehnquist, joined by Justices White and Kennedy, criticized *Roe* and stated that *Roe*’s “trimester framework has left this Court to serve as the country's ‘ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.‘” Justice Scalia indicated his willingness to overturn *Roe* in its entirety.

In contrast, Justice O’Connor decided that it was not necessary in *Webster* to consider the broader implications of *Roe*, even though she had previously indicated discomfort with the *Roe* framework. In *Webster*, she concluded that even under the *Roe* framework the substantive regulations at issue in this case – a ban on use of public employees, facilities, or funds for performance or assistance with nontherapeutic abortions (i.e., those abortions not needed for the mother’s health), and physicians being required to perform reasonable viability tests on a fetus believed to be of 20 or more weeks gestational age – were constitutional. Laws banning public funds or facilities for abortions have routinely been viewed as constitutional under *Roe*, as noted at § 26.1 n.4. Regarding viability testing, while in 1973 the point of viability was typically viewed as around the 28th week of pregnancy, by 1989, increases in medical technology had moved viability back to typically the 24th week of pregnancy, where it remains today. Based on fetal lung capacity, that point is not likely to change much in the future, although in rare cases fetuses believed to be 20 weeks or older gestational age have survived premature births. Particularly since the parties might be confused as to the time of conception, the statute’s requirement to perform a reasonable viability test on a fetus believed to be in the 20th week of pregnancy was constitutional, since such a fetus might actually be closer to the 24th week of pregnancy, and thus more likely viable. As a general matter, about half of the roughly 1.3 million abortions in the United States each year take place within the first 8 weeks of pregnancy; 9 in 10 occur within the first 12 weeks; and less than 1 percent are performed after 20 weeks. Some 300-600 abortions a year – or up to five one-hundredths of 1 percent – are performed after 26 weeks, when the fetus is likely viable. Almost inevitably, these are done in the context of substantial health risks to the mother or fetal defects not diagnosed until late in the pregnancy.

The legacy of *Roe* as a precedent was squarely faced three years later, in 1992, in *Planned Parenthood v. Casey*. There, in a 5-4 decision, the Court decided not to overrule *Roe v. Wade* in its entirety. Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, dissented on that matter. Justice Scalia said that the Constitution does not protect a fundamental liberty to abort an unborn child because of two facts: "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed." The same Justices also joined in a dissent by Chief Justice Rehnquist which said that

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12  *Id.* at 980 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, J.J., concurring in the judgment in part and dissenting in part).
the Court in Roe read earlier opinions much too broadly. "Unlike marriage, procreation, and contraception, abortion 'involves the purposeful termination of potential life.'" In contrast, Justice Blackmun would have had the Court not disturb Roe's holding and trimester framework in any respect. Justice Stevens, also supporting Roe, said that it protected a woman's freedom to decide matters of the highest privacy and most personal nature.

The outcome of the case thus depended on the views of Justices O'Connor, Kennedy, and Souter. These three Justices joined in a rare joint opinion, parts of which were likely authored by each of the three Justices, but the opinion was not specifically authored by any one Justice. This may have been done, in part, because although Roe v. Wade was a 7-2 opinion when decided, the fact that Justice Blackmun authored the majority opinion meant that he received more than his share of hate mail and death threats concerning the case over the years. The joint opinion opened by rejecting a formalist view that (1) the textually specific protections of the Bill of Rights and (2) the customs and traditions of states at the time of ratification of the 14th Amendment mark the outer limits of liberty protected by due process. Ultimately, they said, it comes down to "reasoned judgment," the hallmark of the natural law style.

Planned Parenthood v. Casey
505 U.S. 833 (1992)

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, an opinion with respect to Part V-E, in which Justice STEVENS joins, and an opinion with respect to Parts IV, V-B, and V-D.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, Roe v. Wade, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again asks us to overrule Roe. See Brief for Respondents 104-117; Brief for United States as Amicus Curiae 8.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203-3220 (1990). Relevant portions of the Act are set forth in the Appendix. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information

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13 Id. at 952 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part).

14 Id. at 911-13 (Stevens, J., concurring in part and dissenting in part); id. at 923-25 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a “medical emergency,” which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall “deprive any person of life, liberty, or property, without due process of law.” The controlling word in the cases before us is “liberty.” Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since Mugler v. Kansas, 123 U.S. 623, 660-661 (1887), the Clause has been understood to contain a substantive component as well, one “barring certain government actions regardless of the fairness of the procedures used to implement them.” Daniels v. Williams, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, “[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion). “[T]he guaranties of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation.’” Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e.g., Duncan v.
Louisiana, 391 U.S. 145, 147-148 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting). But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See Michael H. v. Gerald D., 491 U.S. 110, 127-128, n.6 (1989) (opinion of Scalia, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in Turner v. Safley, 482 U.S. 78, 94-99 (1987); in Carey v. Population Services International, 431 U.S. 678, 684-686 (1977); in Griswold v. Connecticut, 381 U.S. 479, 481-482 (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, id., at 486-488 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (expressly relying on due process), id., at 500-502 (Harlan, J., concurring in judgment) (same), id., at 502-507 (White, J., concurring in judgment) (same); in Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); and in Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923).

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized: “[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” Poe v. Ullman, supra, 367 U.S., at 543 (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not reach in Poe v. Ullman, but the Court adopted his position four Terms later in Griswold v. Connecticut, supra. In Griswold, we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See Eisenstadt v. Baird, 405 U.S. 438 (1972). Constitutional protection was extended to the sale and distribution of contraceptives in Carey v. Population Services International, supra. It is settled now, as it was when the Court heard arguments in Roe v. Wade, that the

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); Texas v. Johnson, 491 U.S. 397 (1989).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey v. Population Services International, 431 U.S., at 685. Our cases recognize “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Eisenstadt v. Baird, supra, 405 U.S., at 453 (emphasis in original). Our precedents “have respected the private realm of family life which the state cannot enter.” Prince v. Massachusetts, 321 U.S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*. We turn now to that doctrine.

III

A

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149
Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an “inexorable command,” and certainly it is not such in every constitutional case, see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-411 (1932) (Brandeis, J., dissenting). See also Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., joined by Kennedy, J., concurring); Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e.g., United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see Patterson v. McLean Credit Union, 491 U.S. 164, 173-174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, e.g., Burnet, supra, 285 U.S., at 412 (Brandeis, J., dissenting).

Although *Roe* has engendered opposition, it has in no sense proven “unworkable,” see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985), representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see Payne v. Tennessee, supra, 501 U.S., at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.

While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity
of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for Roe's holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be \textit{de minimis}. This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, \textit{e.g.}, R. Petchesky, Abortion and Woman's Choice 109, 133, n.7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed.

No evolution of legal principle has left Roe's doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left Roe behind as a mere survivor of obsolete constitutional thinking.

It will be recognized, of course, that Roe stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The Roe Court itself placed its holding in the succession of cases most prominently exemplified by Griswold v. Connecticut, 381 U.S. 479 (1965). See Roe, 410 U.S., at 152-153. When it is so seen, Roe is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, \textit{e.g.}, Carey v. Population Services International, 431 U.S. 678 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977).

\textit{Roe}, however, may be seen not only as an exemplar of Griswold liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since Roe accord with \textit{Roe}'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278 (1990); cf., \textit{e.g.}, Riggins v. Nevada, 504 U.S. 127, 135 (1992); Washington v. Harper, 494 U.S. 210 (1990); see also, \textit{e.g.}, Rochin v. California, 342 U.S. 165 (1952); Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905).
Finally, one could classify *Roe* as *sui generis*. If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (Akron I), and by a majority of five in 1986, see Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see id., at 518 (Rehnquist, C.J., joined by White and Kennedy, JJ.); id., at 529 (O'Connor, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*. See *Webster*, 492 U.S., at 521 (Rehnquist, C.J., joined by White and Kennedy, JJ.); id., at 525-526 (O'Connor, J., concurring in part and concurring in judgment); id., at 537, 553 (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); id., at 561-563 (Stevens, J., concurring in part and dissenting in part).

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see Akron I, supra, 462 U.S., at 429, n.11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe*, 410 U.S., at 160, with *Webster*, supra, 492 U.S., at 515-516 (opinion of Rehnquist, C.J.); see Akron I, 462 U.S., at 457, and n.5 (O'Connor, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe* 's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe* 's factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

While [*Roe*] has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe* ‘s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe* ‘s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe* 's central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.
In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with *Lochner v. New York*, 198 U.S. 45 (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of *laissez-faire*. Id., at 75 (dissenting opinion). The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co., supra*, at 399. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: “The older world of *laissez-faire* was recognized everywhere outside the Court to be dead.” The Struggle for Judicial Supremacy 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with *Plessy v. Ferguson*, 163 U.S. 537 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered “the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” Id., at 551. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see id., at 557, 562 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*). As one commentator observed, the question before the Court in *Brown* was “whether discrimination inheres in that
segregation which is imposed by law in the twentieth century in certain specific states in the
American Union. And that question has meaning and can find an answer only on the ground of
history and of common knowledge about the facts of life in the times and places aforesaid.” Black,

The Court in Brown addressed these facts of life by observing that whatever may have been the
understanding in Plessy’s time of the power of segregation to stigmatize those who were segregated
with a “badge of inferiority,” it was clear by 1954 that legally sanctioned segregation had just such
an effect, to the point that racially separate public educational facilities were deemed inherently
unequal. 347 U.S., at 494-495. Society's understanding of the facts upon which a constitutional
ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision
in 1896. While we think Plessy was wrong the day it was decided, see Plessy, supra, 163 U.S., at
552-564 (Harlan, J., dissenting), we must also recognize that the Plessy Court's explanation for its
decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to
reexamine Plessy was on this ground alone not only justified but required.

West Coast Hotel and Brown each rested on facts, or an understanding of facts, changed from those
which furnished the claimed justifications for the earlier constitutional resolutions. Each case was
comprehensible as the Court's response to facts that the country could understand, or had come to
understand already, but which the Court of an earlier day, as its own declarations disclosed, had not
been able to perceive. As the decisions were thus comprehensible they were also defensible, not
merely as the victories of one doctrinal school over another by dint of numbers (victories though they
were), but as applications of constitutional principle to facts as they had not been seen by the
Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose
new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior
case as a response to the Court's constitutional duty.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some
freedom to terminate her pregnancy. We conclude that the basic decision in Roe was based on a
constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited,
however, that from the outset the State cannot show its concern for the life of the unborn, and at a
later point in fetal development the State's interest in life has sufficient force so that the right of the
woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at Roe, a criticism that
always inheres when the Court draws a specific rule from what in the Constitution is but a general
standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control
over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that
function. Liberty must not be extinguished for want of a line that is clear. And it falls to us to give
some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.
We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See *Thornburgh* v. American College of Obstetricians and Gynecologists, 476 U.S., at 759; *Akron* I, 462 U.S., at 419-420. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe* v. *Wade*, 410 U.S., at 163. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. """'[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.'"" Webster v. Reproductive Health Services, 492 U.S., at 511 (opinion of the Court) (quoting *Poelker* v. *Doe*, 432 U.S. 519, 521 (1977)). It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*' s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. See *Webster* v. *Reproductive Health Services*, 492 U.S., at 518 (opinion of *Rehnquist*, C.J.); id., at 529 (O'Connor, J., concurring in part and concurring in judgment) (describing the trimester framework as """"problematic""""). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced
in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. *Anderson v. Celebreezze*, 460 U.S. 780, 788 (1983); *Norman v. Reed*, 502 U.S. 279 (1992).

The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. See *Hodgson v. Minnesota*, 497 U.S. 417, 458-459 (1990) (O'Connor, J., concurring in part and concurring in judgment in part); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-520 (1990) (Akron II) (opinion of Kennedy, J.); *Webster v. Reproductive Health Services*, supra, 492 U.S., at 530 (O'Connor, J., concurring in part and concurring in judgment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S., at 828 (O'Connor, J., dissenting); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring in part and concurring in judgment); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in judgment in part and dissenting in part); *Akron I*, 462 U.S., at 464 (O'Connor, J., joined by White and Rehnquist, JJ., dissenting); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (Bellotti I ).

For the most part, the Court's early abortion cases adhered to this view. In *Maher v. Roe*, 432 U.S. 464, 473-474 (1977), the Court explained: "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." See also *Doe v. Bolton*, 410 U.S. 179, 198 (1973) ( "[T]he interposition of the hospital abortion committee is unduly restrictive of the patient's rights"); *Bellotti I*, supra, 428 U.S., at 147 (State may not "impose undue burdens upon a minor capable of giving an informed consent"); *Harris v. McRae*, 448 U.S. 297, 314 (1980) (citing *Maher*, supra ). Cf. *Carey v. Population Services International*, 431 U.S., at 688 ("[T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely").
A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard. Cf. McCleskey v. Zant, 499 U.S. 467, 489 (1991) (attempting “to define the doctrine of abuse of the writ with more precision” after acknowledging tension among earlier cases). In our considered judgment, an undue burden is an unconstitutional burden. See Akron II, 497 U.S., at 519-520 (opinion of Kennedy, J.). Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. See, e.g., Akron I, 462 U.S., at 462-463 (O'Connor, J., dissenting). The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See infra (addressing Pennsylvania's parental consent requirement) [Ed.: discussed in this Coursebook at § 26.4 n.19]. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

We also reaffirm Roe's holding that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” Roe v. Wade, 410 U.S., at 164-165.

Regarding the Court’s discussion of precedent in Part III, Justice Rehnquist challenged, in dissent, the view that Roe had engendered sufficient reliance to justify not overruling Roe on that ground. He stated, “The joint opinion turns to what can only be described as an unconventional – and unconvincing – notion of reliance, a view based upon the surmise that the availability of abortion since Roe has led to ‘two decades of economic and social developments’ that would be undercut if the error of Roe were recognized. The joint opinion's assertion of this fact is undeveloped and totally conclusory. . . . Surely it is dubious to suggest that women have reached their ‘places in society’ in reliance upon Roe, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to
fill positions that were previously thought to be reserved only for men.”

In Chief Justice Rehnquist’s view, since reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortion, “any traditional notion of reliance is not applicable here.”

Even if one agrees with Chief Justice Rehnquist on this point, under the natural law theory of precedent, even if a precedent is not “settled law” and there is no “substantial reliance” on it, precedent should still be followed unless there is some additional reason to overrule it, as discussed at § 2.4.6 nn.79-86. Those reasons, as listed at § 2.4.6 n.86, are: (1) the precedent is unworkable in practice; (2) the precedent creates an inconsistency or incoherence in the law; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the precedent represents a substantially wrong or substantially unjust interpretation of the law, or is based on substantially flawed reasoning; or (5) the precedent raises concerns about a commitment to the "rule of law," such as being a precedent decided without full briefing and argument. As the joint opinion in Casey noted, none of those factors applied in this case. In contrast, as noted at § 2.4.6 nn.80-83, for a Holmesian Justice like Chief Justice Rehnquist, if a precedent is viewed as being wrong, and it is not “settled law” and there is no “substantial reliance” on it, then the precedent should be overruled.

Given the literal text in Casey, which indicated, at the end of Part IV, that an undue burden is an unconstitutional burden, it could be argued that once something is viewed as an undue burden – that is, in the Court’s definition a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” – it is automatically unconstitutional. The better analysis of Casey, consistent with the general structure of fundamental rights analysis, is that when the joint opinion stated it was upholding the core holding of Roe, that meant a court should apply Roe’s strict scrutiny analysis to undue burdens on abortion rights. This would mean that where the state has a compelling interest to regulate, such as to protect maternal health from the first trimester on, a narrowly tailored statute directly related to advancing that interest and employing the least burdensome effective alternative would be constitutional. For example, a regulation that might, as applied to a particular woman, place a “substantial obstacle in the path of that woman obtaining an abortion of a pre-viable fetus,” but that could be shown under a strict scrutiny approach to be necessary to protect the compelling health interest of that mother, would likely be viewed by the Court as constitutional, even though it would be an “undue burden” under the Court’s precise language in Casey.

15 505 U.S. at 956-57 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part).

16 Id. at 956.

Similarly, although the Court did not phrase the analysis in precisely this way, the best way to understand the Court’s detailed discussion of the constitutionality of various kinds of less than undue burdens, addressed at § 26.4, is that for less than undue burdens the Court applies a “second-order” reasonableness analysis, not minimum rationality review deference, since in each of these cases a “fundamental right” is still be regulated, and thus burdened, to some extent. This is consistent with the joint opinion in Casey’s analogy to their undue burden standard being like the right to vote cases, citing Anderson v. Celebrezze, which adopted, as discussed at § 24.3, such a “second-order” reasonableness balancing approach. It is also consistent with the language in Casey, near the end of Part IV, which stated, “Unless it has that effect [substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.” The language in the next sentence of the opinion – “Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden” – reflects, in this view, that under a “reasonableness” balancing test the state will prevail unless the challenger is able to show an “undue burden,” similar to the concern with the existence of a “clearly excessive” burden under the Pike v. Bruce Church test, discussed at § 13.3.1(D) n.39, for Dormant Commerce Clause review; “grossly excessive” burden under the BMW v. Gore test, discussed at § 17.4 n.66, for unconstitutionality of punitive damage awards; not “reasonable and necessary” under the U.S. Trust v. New Jersey test, discussed at § 18.2 n.25, in Contract Clause review; or goes “too far” and thus is not reasonable under the Penn Central test, discussed at § 18.3 text following n.56, for Takings Clause review – all mentioned at § 24.1 nn.1-3 – or whether the state’s interests justify “reasonable, nondiscriminatory restrictions” under Anderson v. Celebrezze, discussed at § 24.3 n.13, or is an “unreasonable” burden, as in Turner v. Safley, discussed at § 25.4.1 n.21.

Despite this analysis, lower courts following Casey have sometimes phrased the issue as a simple dichotomy between what they view as “undue burdens,” which are presumptively unconstitutional, versus what they view as not “undue burdens,” which are presumptively constitutional. Others have noted it is a two-step requirement, as suggested by the analysis above, but that if the regulation is not an “undue burden” it only must be rationally related to a legitimate interest. These cases are discussed at § 26.4 nn.24-28. The Supreme Court clarified in Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) that the Casey “undue burden” standard does involve two steps: (1) whether the regulation is a “substantial obstacle” on abortion choice, and (2) even if not, is the regulation “reasonably related” to a “legitimate” interest, balancing both benefits and burdens, a second-order review higher than minimum rationality review. See generally R. Randall Kelso, The Structure of Planned Parenthood v. Casey Abortion Rights Law: “Strict Scrutiny” for “Substantial Obstacles” on Abortion Choice and Otherwise “Reasonableness Balancing,” 34 Quinnipiac L. Rev. 75 (2015).

The importance of the undue burden analysis in the joint opinion in Casey was to ensure that not every abortion regulation triggered strict scrutiny, and thus the Court did not act as super-legislature second-guessing every aspect of abortion regulation. Rather, the strict scrutiny analysis was restricted in Casey to protecting the core principle of personal liberty from undue burdens. This has allowed states a wider latitude than they had under Roe to pass various kinds of regulation of abortion procedures, addressed at § 26.4, and not have to face a strict scrutiny analysis as typically they did under Roe, as reflected in the cases discussed at § 26.2 nn.1-3, as long as the regulations do not place a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”
§ 26.3  **Substantial Burdens on Abortion Rights in the Casey Era**

**Planned Parenthood v. Casey**  
505 U.S. 833 (1992)

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, an opinion with respect to Part V-E, in which Justice STEVENS joins, and an opinion with respect to Parts IV, V-B, and V-D.

V

C

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

The District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute. These included:

“273. The vast majority of women consult their husbands prior to deciding to terminate their pregnancy. . . .

“279. The ‘bodily injury’ exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. . . .

“298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of whether the section applies to them.” 744 F.Supp., at 1360-1362.

The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, also supports the District Court's findings of fact. The vast majority of women notify their male partners of their decision to
obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by . . . violence. Ryan & Plutzer, When Married Women Have Abortions: Spousal Notification and Marital Interaction, 51 J. Marriage & the Family 41, 44 (1989).

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, § 3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins, § 3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by § 3209.

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

We recognize that a husband has a “deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.” Danforth, supra, at 69. With regard to the children he has fathered and raised, the Court has recognized his “cognizable and substantial” interest in their custody. Stanley v. Illinois, 405 U.S. 645, 651-652 (1972); see also Quilloon v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979). If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.
Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that
state regulation with respect to the child a woman is carrying will have a far greater impact on the
mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is
doubly deserving of scrutiny in such a case, as the State has touched not only upon the private
sphere of the family but upon the very bodily integrity of the pregnant woman. Cf. Cruzan v.
Director, Mo. Dept. of Health, 497 U.S., at 281. The Court has held that “when the wife and the
husband disagree on this decision, the view of only one of the two marriage partners can prevail.
Inasmuch as it is the woman who physically bears the child and who is the more directly and
immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”
Danforth, supra, 428 U.S., at 71. This conclusion rests upon the basic nature of marriage and the
nature of our Constitution: “[T]he marital couple is not an independent entity with a mind and heart
of its own, but an association of two individuals each with a separate intellectual and emotional
makeup. If the right of privacy means anything, it is the right of the individual, married or single,
to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person
as the decision whether to bear or beget a child.” Eisenstadt v. Baird, 405 U.S., at 453 (emphasis in
original). The Constitution protects individuals, men and women alike, from unjustified state
interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the
Constitution prevailed. In Bradwell v. State, [83 U.S. (16 Wall.)] 130 (1873), three Members of this
Court reaffirmed the common-law principle that “a woman had no legal existence separate from her
husband, who was regarded as her head and representative in the social state; and, notwithstanding
some recent modifications of this civil status, many of the special rules of law flowing from and
dependent upon this cardinal principle still exist in full force in most States.” Id., at 141 (Bradley,
J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since
this Court observed that “woman is still regarded as the center of home and family life,” with
attendant “special responsibilities” that precluded full and independent legal status under the
Constitution. Hoyt v. Florida, 368 U.S. 57, 62 (1961). These views, of course, are no longer
consistent with our understanding of the family, the individual, or the Constitution.

In keeping with our rejection of the common-law understanding of a woman's role within the family,
the Court held in Danforth that the Constitution does not permit a State to require a married woman
to obtain her husband's consent before undergoing an abortion. 428 U.S., at 69. The principles that
guided the Court in Danforth should be our guides today. For the great many women who are
victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a
spousal notice requirement enables the husband to wield an effective veto over his wife's decision.
Whether the prospect of notification itself deters such women from seeking abortions, or whether
the husband, through physical force or psychological pressure or economic coercion, prevents his
wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount
to the veto found unconstitutional in Danforth. The women most affected by this law – those who
most reasonably fear the consequences of notifying their husbands that they are pregnant – are in
the gravest danger.
Chief Justice REHNQUIST, joined by Justices WHITE, SCALIA, and THOMAS, concurring in the judgment in part and dissenting in part.

[Ed.: These Justices first voted to overrule Roe, thus concluding there is no fundamental right to abortion choice. Therefore, this case involved for them only minimum rationality review applied to ordinary social and economic legislation.] The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See Planned Parenthood of Central Mo. v. Danforth, 428 U.S., at 69 (“We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying”); id., at 93 (White, J., concurring in part and dissenting in part); Skinner v. Oklahoma ex rel. Williamson, 316 U.S., at 541. The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, “[t]he Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems – such as economic constraints, future plans, or the husbands' previously expressed opposition – that may be obviated by discussion prior to the abortion.” 947 F.2d, at 726 (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting “the integrity of the marital relationship.” 18 Pa. Cons. Stat. § 3209(a) (1990). This Court has previously recognized “the importance of the marital relationship in our society.” Planned Parenthood of Central Mo. v. Danforth, supra, 428 U.S., at 69. In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity. . . . See Labine v. Vincent, 401 U.S. 532, 538 (1971) (“[T]he power to make rules to establish, protect, and strengthen family life” is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest; they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. . . . But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See Planned Parenthood of Central Mo. v. Danforth, supra, 428 U.S., at 103-104 (Stevens, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but “the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect.” Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S., at 800 (White, J., dissenting). The Pennsylvania Legislature was in a position to weigh the
likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See Harris v. McRae, 448 U.S., at 325-326 (“It is not the mission of this Court or any other to decide whether the balance of competing interests . . . is wise social policy”).

In 1998, in Voinovich v. Women’s Medical Professional Corp., the Court denied certiorari to a federal court of appeals decision holding unconstitutional an Ohio law that prohibited post-viability abortions. The lower court said that the law’s exceptions for abortions necessary to prevent the death of the pregnant woman or a serious risk of impairing a major bodily function did not provide an exception for abortions based on the pregnant woman’s mental health. Chief Justice Rehnquist, and Justices Scalia and Thomas, dissented, saying that no prior court ruling supported the proposition that a mental health exception is required as a matter of federal constitutional law.

§ 26.4 Less Than Substantial Burdens on Abortion Rights in the Casey Era

In contrast to striking down the requirement of spousal notification in Casey, the joint opinion of Justices O’Connor, Kennedy, and Souter upheld as not “undue burdens” requirements of written informed consent, providing certain information to the patient, a 24-hour waiting period after registering for an abortion before the procedure could be done, required record keeping, and a parental consent provision for women under 18, with a judicial bypass. Some of these provisions, like required record-keeping and parent consent with a judicial bypass, had already been upheld as constitutional under Roe, as noted at § 26.1 nn.4, 6. Some of these provisions, like a 24-hour waiting period or informed consent requirement, had been viewed as unconstitutional under Roe’s strict scrutiny approach, as noted at § 26.1 n.3. Now they were upheld as less than undue burdens on abortion rights. For example, regarding the informed consent provision, the joint opinion stated:

A requirement that the physician make available information similar to that mandated by the statute here was described in [Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 760-66 (1986)] as “an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician.” 476 U.S., at 762. We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As we have made clear, we depart from the [holding of Thornburgh] to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.


19 505 U.S. at 874-901 (joint opinion of O’Connor, Kennedy & Souter, JJ.).
In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.20

Regarding the 24-hour waiting period, the joint opinion stated:

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider [Ed.: for example, as of 2014 there is only one abortion clinic in Mississippi, North Dakota, and South Dakota, and only three in Kansas], the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to “the harassment and hostility of anti-abortion protestors demonstrating outside a clinic.” 744 F.Supp., at 1351. As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be “particularly burdensome.” Id., at 1352.

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of “increasing the cost and risk of delay of abortions,” id., at 1378, but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. . . . In light of the construction given the statute's definition of medical emergency by the Court of Appeals [Ed.: which permits waiving the waiting period in case of a medical emergency], and the District Court's findings, we cannot say that the waiting period imposes a real health risk. . . . Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.21

Since 2010, a number of states have adopted waiting periods of 48 hours or 72 hours. On these, see June Medical Services v. Gee, 280 F. Supp. 3d 849 (M.D. La. 2017) (plaintiff states a colorable claim that 72-hour waiting period an undue burden); Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard, 799 F. Supp. 2d 1048 (D. South Dakota 2011) (72-hour waiting period undue burden where only one clinic in the state and it typically performs abortions only one day a week); Doe v. Greitens, 530 S.W.3d 571 (W.D. Mo. 2017) (72-hour waiting period raises colorable claim imposing religion in violation of Establishment Clause and violating Free Exercise Clause).

20 Id. at 883.

21 Id. at 885-87.

The Court ruled on the issue of a physical health exception in 2000. In Stenberg v. Carhart, a 5-4 Court ruled that a Nebraska statute banning partial-birth abortions, both pre-viability and post-viability, was unconstitutional as not having a sufficient exception for the life or substantial health interests of the mother, as required by Roe and Casey. In dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded the law’s medical emergency exception, as a less than undue burden on choice, was sufficient to meet the maternal health exception of Casey. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented calling for Roe and Casey to be overruled.

Following Stenberg, Congress passed its own version of a partial-birth abortion ban in 2003, with an even more limited health exception than in the Nebraska statute, with Congress taking the view that no medical emergencies short of life-threatening conditions could ever justify a partial-birth abortion. By the time a case challenging the ban got to the Supreme Court in 2007, Justice O’Connor, who was the critical fifth vote in Stenberg, had been replaced by Justice Alito. Justice Kennedy therefore held the critical fifth vote, and he decided consistent with his Stenberg dissent.

Gonzales v. Carhart

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U.S.C. § 1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. In recitations preceding its operative provisions the Act refers to the Court's opinion in Stenberg v. Carhart, 530 U.S. 914 (2000), which also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in Stenberg, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the . . . broad, facial attack brought against it.

22 530 U.S. 914, 920-22, 930-31 (2000); id. at 956-58, 964 (Kennedy, J., joined by Rehnquist, C.J., dissenting); id. at 980-81 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). See also Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 511-14 (6th Cir. 2006) (upholding district court’s preliminary injunction, which held unconstitutional a law restricting use of RU-486 pill to use approved by the Food and Drug Administration, because no adequate medical emergency exception if surgical abortion would post significantly greater health risk to the mother).
The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail. . . .

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. Planned Parenthood, supra, at 960, and n.4; App. in No. 05-1382, pp. 45-48. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU-486), to terminate the pregnancy. National Abortion Federation, supra, at 464, n.20. The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as “dilation and evacuation” or “D & E” is the usual abortion method in this trimester. Planned Parenthood, supra, at 960-961. Although individual techniques for performing D & E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. National Abortion Federation, supra, at 465; App. in No. 05-1382, at 61. The steps taken to cause dilation differ by physician and gestational age of the fetus. See, e.g., Carhart, supra, at 852, 856, 859, 862-865, 868, 870, 873-874, 876-877, 880, 883, 886. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. National Abortion Federation, supra, at 464-465; Planned Parenthood, supra, at 961.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. See, e.g., National Abortion Federation, supra, at 465; Planned Parenthood, 320 F.Supp.2d, at 962.
Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. Carhart, supra, at 907-912; National Abortion Federation, supra, at 474-475.

The abortion procedure that was the impetus for the numerous bans on “partial-birth abortion,” including the Act, is a variation of this standard D & E. See M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), 1 Appellant's App. in No. 04–3379(CA8), p. 109 (hereinafter Dilation and Extraction). The medical community has not reached unanimity on the appropriate name for this D & E variation. It has been referred to as “intact D & E,” “dilation and extraction” (D & X), and “intact D & X.” National Abortion Federation, supra, at 440, n.2. For discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D & Es are performed in this manner.

Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called “serial” dilation. Carhart, 331 F.Supp.2d, at 856, 870, 873; Planned Parenthood, supra, at 965. Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use up to 25 osmotic dilators. See, e.g., Dilation and Extraction 110; Carhart, supra, at 865, 868, 876, 886.

In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified: “If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible.” App. in No. 05–1382, at 74.

D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D & E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about 5 percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about 0.07 percent of second-trimester abortions. National Abortion Federation, 330 F.Supp.2d, at 467; Planned Parenthood, supra, at 962-963.
The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* “was required to accept the very questionable findings issued by the district court judge,” § 2(7), 117 Stat. 1202, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (7) (hereinafter Congressional Findings), but that Congress was “not bound to accept the same factual findings,” *id.*., ¶ (8). Congress found, among other things, that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.” *Id.*., ¶ (1).

Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. See 530 U.S., at 921-922 (quoting Neb. Rev. Stat. Ann. §§ 28–328(1), 28-326(9) (Supp.1999)). The operative provisions of the Act provide in relevant part: “(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a 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. This subsection takes effect 1 day after the enactment. (b) As used in this section – (1) the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion (A) deliberately and intentionally vaginally delivers a living fetus until, 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, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .”

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Casey*, 505 U.S., at 878 (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a “disturbing similarity to the killing of a newborn infant,” Congressional Findings ¶(14)(L), and thus it was concerned with “draw[ing] a bright line that clearly distinguishes abortion and infanticide,” *id.*., ¶ (14)(G). The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found
reasonable the State's “fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.” 521 U.S., at 732-735, and n.23.

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where “‘necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.’” Ayotte, 546 U.S., at 327-328 (quoting Casey, supra, at 879 (plurality opinion)). The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it “subject[ed] [women] to significant health risks.” Ayotte, supra, at 328; see also Casey, supra, at 880 (opinion of the Court). In Ayotte the parties agreed a health exception to the challenged parental-involvement statute was necessary “to avert serious and often irreversible damage to [a pregnant minor's] health.” 546 U.S., at 328. Here, by contrast, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D & E may be the safest method of abortion, for reasons similar to those adduced in Stenberg. See 530 U.S., at 932. Abortion doctors testified, for example, that intact D & E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D & E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D & E was safer for women with certain medical conditions or women with fetuses that had certain anomalies. See, e.g., Carhart, 331 F.Supp.2d, at 923-929; National Abortion Federation, 330 F.Supp.2d, at 470-474; Planned Parenthood, 320 F.Supp.2d, at 982-983.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D & E always to be a safe alternative. See, e.g., Carhart, supra, at 930-940; National Abortion Federation, supra, at 470-474; Planned Parenthood, 320 F.Supp.2d, at 983.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. See, e.g., id., at 1033 (“[T]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D & E”); see also National Abortion Federation, supra, at 482. The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question. The District Court for the District of Nebraska concluded “the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women.” Carhart, supra, at 1017. The District Court for the Northern District of California reached a similar conclusion. Planned Parenthood, supra, at 1002 (finding intact D & E was “under certain circumstances . . . significantly safer than D & E by disarticulation”). The District Court for the Southern District of New York was more skeptical of the purported health benefits of intact D & E. It found the Attorney General's “expert witnesses
reasonably and effectively refuted [the plaintiffs’] proffered bases for the opinion that [intact D & E] has safety advantages over other second-trimester abortion procedures.” National Abortion Federation, 330 F.Supp.2d, at 479. In addition it did “not believe that many of [the plaintiffs’] purported reasons for why [intact D & E] is medically necessary [were] credible; rather [it found them to be] theoretical or false.” Id., at 480. The court nonetheless invalidated the Act because it determined “a significant body of medical opinion . . . holds that D & E has safety advantages over induction and that [intact D & E] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances.” Ibid.

The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See Kansas v. Hendricks, 521 U.S. 346, 360, n.3 (1997); Jones v. United States, 463 U.S. 354, 364-365, n.13 (1983); Lambert v. Yellowley, 272 U.S. 581, 597 (1926); Collins v. Texas, 223 U.S. 288, 297-298 (1912); Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905); see also Stenberg, supra, at 969-972 (Kennedy, J., dissenting); Marshall v. United States, 414 U.S. 417, 427 (1974) (“When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad”).

. . . . The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D & E. One District Court found D & E to have extremely low rates of medical complications. Planned Parenthood, supra, at 1000. Another indicated D & E was “generally the safest method of abortion during the second trimester.” Carhart, 331 F.Supp.2d, at 1031; see also National Abortion Federation, supra, at 467-468 (explaining that “[e]xperts testifying for both sides” agreed D & E was safe). In addition the Act’s prohibition only applies to the delivery of “a living fetus.” 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). If the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Brief for Petitioner in No. 05-380, at 23. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See Crowell v. Benson, 285 U.S. 22, 60 (1932) (“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 fact and law, necessary to the performance of that supreme function”).

On the other hand, relying on the Court’s opinion in Stenberg, respondents contend that an abortion regulation must contain a health exception “if ‘substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.’” Brief for Respondents in No. 05-380, p. 19 (quoting 530 U.S., at 938); see also Brief for Respondent Planned Parenthood et al.
in No. 05-1382, at 12 (same). As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. Carhart, 413 F.3d, at 796; Planned Parenthood, 435 F.3d, at 1173; see also National Abortion Federation, 437 F.3d, at 296 (Walker, C. J., concurring) (explaining the standard under *Stenberg* “is a virtually insurmountable evidentiary hurdle”).

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

[R]espondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases. Casey, supra, at 895 (opinion of the Court). We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. “[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.” United States v. Raines, 362 U.S. 17, 21 (1960) (internal quotation marks omitted). For this reason, “[a]s-applied challenges are the basic building blocks of constitutional adjudication.” Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000).


Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Seven years ago, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed “partial-birth abortion.” [FN1: The term “partial-birth abortion” is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E). See, e.g., ante, at 1621; Stenberg v. Carhart, 530 U.S. 914, 927 (2000).] [T]he Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health. Stenberg, 530 U.S., at 930 . . . .
Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

Each of the District Courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence. See Carhart, 331 F.Supp.2d, at 1008-1027; National Abortion Federation, 330 F.Supp.2d, at 482, 488-491; Planned Parenthood, 320 F.Supp.2d, at 1032. The trial courts concluded, in contrast to Congress' findings, that “significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure.” Id., at 1033 (quoting *Stenberg*, 530 U.S., at 932); accord Carhart, 331 F.Supp.2d, at 1008-1009, 1017-1018; National Abortion Federation, 330 F.Supp.2d, at 480-482. Cf. *Stenberg*, 530 U.S., at 932.

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures – along with D & E by dismemberment – the Court says, saves the ban on intact D & E from a declaration of unconstitutionality. Never mind that the procedures deemed acceptable might put a woman's health at greater risk.

The Court's allowance only of an “as-applied challenge in a discrete case,” jeopardizes women's health and places doctors in an untenable position. Even if courts were able to carve out exceptions through piecemeal litigation for “discrete and well-defined instances,” women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are “the proper manner to protect the health of the woman.” Cf. ibid.

In *Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Nixon*, 220 S.W.3d 732 (Mo. 2007), the Missouri Supreme Court upheld a Missouri law that prohibits aid and assistance to minors in obtaining an abortion without following Missouri’s “parental consent or a judicial bypass” law. To minimize First Amendment free speech problems, the Court read the statute to not prohibit provision of information or counseling to pregnant minors about out-of-state options, but only to regulate conduct, such as driving a minor across state lines to obtain an abortion out-of-state. To deal with possible due process and commerce clause problems, the court read the statute to not include conduct outside the state of Missouri, noting that it is beyond Missouri’s authority to regulate conduct that occurs wholly outside of Missouri. With these limitations, the court viewed the statute as a less than undue burden on abortion rights.
Following the 2010 elections, a spate of new abortion restricting laws, or more vigorous enforcement of pre-existing laws, have increased abortion litigation. Many government actions have been held unconstitutional by courts. A number of these cases have involved direct challenges to the Roe and Casey doctrine that viability is a critical point in terms of state ability to regulate abortion. Not surprisingly, courts have found these regulations unconstitutional.23 A number of cases have involved challenges to statutes requiring abortion clinics to have admitting privileges at a local hospital, ostensibly to facilitate transfer of patients from the clinic to a hospital in the event of a medical emergency arising during the abortion procedure. In reality, most hospitals choose not to grant abortion clinics admitting privileges, and thus the effect of the regulation, if enforced, would be to shut down the clinic. In the event of a medical emergency, the emergency room of a hospital would be required to admit the patient anyway, so the admitting privilege requirement serves little legitimate state purpose. Lower courts have tended to find these requirements unconstitutional,24 although an argument exists that perhaps depending on their operation in practice they are not “undue burdens” on abortion choice.25 A range of other regulations have also been declared unconstitutional by the courts in various contexts.26

23 See, e.g., Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013) (Arizona law prohibiting abortions where the probably gestational age is at least 20 weeks unconstitutional, as viability is usually thought to occur between the 23rd and 24th weeks of pregnancy); MKB Management Corp. v. Burdick, 954 F. Supp. 2d 900 (D.N.D. 2013) (preliminary injunction against North Dakota law prohibiting abortions following detection of heartbeat, which occurs many weeks before viability).

24 See, e.g., Planned Parenthood of Wisconsin, Inc. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013) (preliminary injunction against Wisconsin law requiring physicians performing abortions to have admitting privileges at hospital within 30 miles of their clinic, using two-part test that the regulation is not likely to be shown to be “reasonably related to the State’s legitimate interest in maternal health”, and in any event works an “undue burden” on abortion choice); Planned Parenthood Southeast, Inc. v. Bentley, 951 F. Supp. 2d 1280 (M.D. Ala. 2013) (same with respect to Alabama law); Jackson Women’s Health Organization v. Currier, 878 F. Supp. 2d 714 (2012) (preliminary injunction granted based on “undue burden” analysis only with respect to Mississippi law).

25 See, e.g., Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583 (5th Cir. 2014) (Texas admitting privileges law and requirement that abortion clinics meet “surgical center” standards not “undue burden” and satisfy “minimum rationality review”), petition for rehearing and rehearing en banc denied, 769 F.3d 330 (5th Cir. 2014), result overturned in Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (both requirements “undue burdens”).

26 See, e.g., McCormack v. Hiedeman, 694 F.3d 1004 (9th Cir. 2012) (Idaho law prohibiting a person from seeking an abortion in any place other than a hospital, doctor’s office, or clinic unconstitutional as applied to a women who terminated her pregnancy by a taking an abortion-inducing drug prescribed by a physician and lawfully purchased over the Internet); Hodes v. Nauser, Mds, P.A. v. Moser, 2012 WL 1831549 n.3 (2012) (parties agree to an injunction against Kansas licensing and building regulations, which would have had the effect of closing 2 of the 3 existing abortion clinics in the state, pending resolution of the state court action); Planned Parenthood
On the other hand, some of these post-2010 regulations have been upheld. For example, the Fifth Circuit Court of Appeals has upheld a Texas law requiring doctor to display a sonogram of the fetus, make audible a heartbeat, and explain the results of each procedure 24 hours before an abortion is performed, and requiring the woman to sign a statement indicating these things were provided, and she either viewed the sonogram and/or heard the images, or declined, constitutional as a reasonable “informed consent” regulation. Other informed consent requirements or aspects of state funding have also been upheld. For further discussion of recent cases involving abortion rights, see CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (2018 Supplement § 27.3.4.1, pages 2105-06) (http://libguides.stcl.edu/kelsomaterials).

Arizona, Inc. v. Humble, 753 F.3d 905 (9th Cir. 2014) (district court abused discretion to deny preliminary injunction against Arizona statute requiring that medications used to induce abortions be administered in compliance with on-label regimen, when no evidence of medical justification for that requirement, using two-part test and focusing on “independent review of evidence” language in Gonzales v. Carhart to underscore that “undue burden” analysis is not minimum rationality review, but involves a balancing of the strengths of the state’s legitimate interests against the amount of the burden on the individual); National Institute of Family and Life Advocates v. Becerra, 138 S.Ct. 2361 (2018) (required notice at licensed private "pregnancy centers" stating existence of publicly-funded family planning services, including contraception and abortion, and requiring unlicensed facilities to disseminate notice they were unlicensed, violate free speech rights of centers); The Evergreen Ass’n, Inc. v. City of New York, 740 F.3d 233 (2nd Cir. 2014) (required disclosure if “pregnancy center” provides no emergency contraceptive, abortion services, or prenatal care violates free speech of center; required disclosure if center has no licensed medical provider on staff constitutional); Whole Women’s Health v. Hellerstedt, 2017 WL 462400 (W.D. Tex. 2017) (preliminary injunction against Texas law regulating disposal of fetal tissue which applied before viability). On cases involving funding, see Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Department of Health, 699 F.3d 962 (7th Cir. 2012) (Indiana’s attempt to defund abortion providers likely violates Medicaid’s “free choice of provider” provision, but separate provision involving a block grant of funds to Indiana to monitor sexually transmitted diseases not preempted); Planned Parenthood Arizona, Inc. v. Betlach, 727 F.3d 960 (9th Cir. 2013) (Arizona’s attempt to defund abortion providers violates Medicaid’s “free choice” provisions).

27 Texas Medical Providers Performing Abortion Serv. v. Lakey, 667 F.3d 570 (5th Cir. 2012). But see Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014) (North Carolina law requiring abortion providers perform ultrasound and describe images to women likely violates First Amendment).

28 See, e.g., Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Templeton, 2013 WL 3322332 (2013) (“informed consent” provision requiring a physician to provide a woman seeking an abortion with information about the capacity of the fetus to feel pain at specific gestational ages constitutional); Planned Parenthood Ass’n of Hidalgo County Texas, Inc. v. Suehs, 692 F.3d 343 (5th Cir. 2012) (regulations barring organizations from receiving funding from the Texas Women’s Health Program if they affiliated with entities that promote elective abortions constitutional under First Amendment freedom of speech and freedom of association).
CHAPTER 27: ADDITIONAL FUNDAMENTAL RIGHTS CASES

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§ 27.1 Additional Possible Decisional Privacy Cases Under Due Process

1. Decisional Privacy Regarding Matters of Sexual Activity

At the end of the instrumentalist era, in 1986, the Court held in a 5-4 decision in Bowers v. Hardwick, that there is no fundamental right to engage in homosexual sodomy. Justice White's opinion said that the privacy line of precedents had connections more with reproductive rights involved with marriage, establishing a home and raising children, and decisions whether to "bear or begat" a child, and that those rights were not implicated by a statute regulating sodomy. Those cases did not support, he said, recognition of a fundamental right to engage in any kind of private sexual conduct between consenting adults. Against a background of legislative practice – important for a Holmesian like Justice White – in which, until 1961, all 50 states outlawed sodomy, and 24 states and the District of Columbia continued to provide penalties in 1986, it could not be claimed that a right to engage in such conduct was "deeply rooted in the Nation's history or traditions." Holmesian Justice White's opinion was joined by formalist Chief Justice Burger, Holmesian Justice Rehnquist, and natural law Justices Powell and O'Connor, who both had some Holmesian deference-to-government leanings, as noted at § 1.1.2 Table 3. Indicating the difficulty of the issue for a modern natural law judge, Justice Powell, concurring, raised Eighth Amendment cruel and unusual punishment problems if the penalty for sodomy were too severe. Further, Justice Powell indicated once he had left the Court that he had originally voted in conference for the recognition of a fundamental right in Bowers, and that he now thought he should have stayed with his original vote. While there were not many prosecutions of homosexual sodomy, either before or after Bowers, the existence of criminal sodomy laws were used in family law, public employment law, and immigration law cases, among others, to the detriment of gay and lesbian individuals.


2 Id. at 197-98 (Powell, J., concurring). On Justice Powell changing his mind about the proper result in Bowers, see Erwin Chemerinsky, Book Review, Opening Closed Chambers, 108 Yale L.J. 1087, 1106 (1999), and sources cited therein.

Justice Blackmun, dissenting with the three other instrumentalists, Justices Brennan, Marshall, and Stevens, said in Bowers that the rights previously recognized as fundamental form a central part of an individual's life. What the Court had refused to recognize in its opinion, Blackmun said, is "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." He added that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."4

In 2003, the Court overruled Bowers v. Hardwick in Lawrence v. Texas.

**Lawrence v. Texas**

Justice KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual intercourse" as follows: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

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4 478 U.S. at 208 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ, dissenting).
Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. 41 S.W.3d 349 (Tex. App. 2001). The majority opinion indicates that the Court of Appeals considered our decision in Bowers v. Hardwick, 478 U.S. 186 (1986), to be controlling on the federal due process aspect of the case. Bowers then being authoritative, this was proper.

We granted certiorari, 537 U.S. 1044 (2002), to consider three questions:

"1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of laws?

"2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?


The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in Bowers.

The facts in Bowers had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U.S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.); id., at 214 (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in Bowers as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so
for a very long time." Id., at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do 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.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. 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.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." Id., at 192. In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. Brief for Cato Institute as *Amicus Curiae* 16-17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15-21; Brief for Professors of History et al. as *Amici Curiae* 3-10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, e.g., King v Wiseman, 92 Eng. Rep. 774, 775 (K. B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, e.g., 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47-50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality*
do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, supra, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, e.g., F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the Bowers decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," Bowers, 478 U.S., at 192, American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as Amici Curiae 14-15, and n 18.

In summary, the historical grounds relied upon in \textit{Bowers} are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in \textit{Bowers} was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

Chief Justice Burger joined the opinion for the Court in \textit{Bowers} and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." 478 US, at 196. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, e.g., Eskridge, Hardwick and Historiography, 1999 U. Ill. L. Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

This emerging recognition should have been apparent when \textit{Bowers} was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2, p 372 (1980). It justified its decision on three
grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed. Brief for Cato Institute as Amicus Curiae 15-16.

In Bowers the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U.S., at 192-193. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. Id., at 197-198, n.2 ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").


Of even more importance, almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Dudgeon v United Kingdom, 45 Eur. Ct. H. R. (1981) P 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. State v. Morales, 869 S.W.2d 941, 943.

Two principal cases decided after Bowers cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Id., at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these
choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Ibid.

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right.

The second post-Bowers case of principal relevance is Romer v. Evans, 517 U.S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," id., at 624 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. Id., at 634.

As an alternative argument in this case, counsel for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The foundations of Bowers have sustained serious erosion from our recent decisions in Casey and Romer. [Ed.: inconsistency in the law is one of the reasons to overrule precedent, as noted at § 2.4.6 n.86.] When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of Bowers has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, e.g., C. Fried, Order and Law: Arguing the Reagan Revolution – A Firsthand Account 81-84 (1991); R. Posner, Sex and Reason 341-350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the

To the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere. The European Court of Human Rights has followed not Bowers but its own decision in Dudgeon v United Kingdom. See P. G. & J. H. v United Kingdom, App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H. R. (1993); Norris v Ireland, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as Amici Curiae 11-12.

The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'") (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))). . . . The holding in Bowers . . . has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on Bowers of the sort that could counsel against overturning its holding once there are compelling reasons to do so. Bowers itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of Bowers does not withstand careful analysis. In his dissenting opinion in Bowers Justice Stevens came to these conclusions: "Our prior cases make two propositions abundantly clear. First, the fact that the 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. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." 478 U.S., at 216 (footnotes and citations omitted)." Justice Stevens' analysis, in our view, should have been controlling in Bowers and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to
a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot
demean their existence or control their destiny by making their private sexual conduct a crime.
Their right to liberty under the Due Process Clause gives them the full right to engage in their
conduct without intervention of the government. "It is a promise of the Constitution that there is a
realm of personal liberty which the government may not enter." Casey, supra, at 847. The Texas
statute furthers no legitimate state interest which can justify its intrusion into the personal and
private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth
Amendment known the components of liberty in its manifold possibilities, they might have been
more specific. They did not presume to have this insight. They knew times can blind us to certain
truths and later generations can see that laws once thought necessary and proper in fact serve only
to oppress. As the Constitution endures, persons in every generation can invoke its principles in their
own search for greater freedom.

Justice O'CONNOR, concurring in the judgment.

join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-
sex sodomy is unconstitutional. See Tex. Penal Code Ann. § 21.06 (2003). Rather than relying on
the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does,
I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual
Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the
same conduct differently based solely on the participants. Those harmed by this law are people who
have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by §
21.06.

It appears that prosecutions under Texas' sodomy law are rare. See State v. Morales, 869 S.W.2d
941, 943 (Tex. 1994) (noting in 1994 that § 21.06 "has not been, and in all probability will not be,
enforced against private consensual conduct between adults"). This case shows, however, that
prosecutions under § 21.06 do occur. [Ed.: Of course, as in Griswold, excerpted at § 25.4.4, the
violation and arrest here may have been arranged to give the parties an injury-in-fact sufficient for
standing and ripeness purposes.] And while the penalty imposed on petitioners in this case was
relatively minor, the consequences of conviction are not. [P]etitioners' convictions, if upheld, would
disqualify them from or restrict their ability to engage in a variety of professions, including
medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. § 164.051(a)(2)(B)
(2003 Pamphlet) (physician); § 451.251 (a)(1) (athletic trainer); § 1053.252(2) (interior designer).
Indeed, were petitioners to move to one of four States, their convictions would require them to
register as sex offenders to local law enforcement. See, e.g., Idaho Code § 18-8304 (Cum. Supp.

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And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992).

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." [Romer v. Evans, 517 U.S.] at 633. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." Id., at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id., at 634.

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." Id., at 641 (Scalia, J., dissenting) (internal quotation marks omitted). When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." Ante, at 156 L Ed 2d, at 523.

Whether a sodomy law that is neutral both in effect and application, see Yick Wo v. Hopkins, 118 U.S. 356 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-113 (1949) (concurring opinion).
That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Justice SCALIA, with whom the CHIEF JUSTICE and Justice THOMAS join, dissenting.


Most of the rest of today's opinion has no relevance to its actual holding – that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. Ante, at 156 L Ed 2d, at 526 (overruling Bowers to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test). Though there is discussion of "fundamental propositions," and "fundamental decisions," nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a "fundamental right." Thus, while overruling the outcome of Bowers, the Court leaves strangely untouched its central legal conclusion: "Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 US, at 191. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty" – which it undoubtedly is – and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

Having decided that it need not adhere to stare decisis, the Court still must establish that Bowers was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S., at 721. We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called "heightened scrutiny" protection – that is, rights which are "deeply rooted in this Nation's history and tradition," ibid. See Reno v. Flores, 507 U.S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); United States v. Salerno, 481 U.S. 739, 751 (1987) (same). See also Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("We have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society"); Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)
(Fourteenth Amendment protects "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" (emphasis added)). All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

It is (as Bowers recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it was criminalized – which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition." The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which Bowers actually relied.

There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880-1995. See W. Eskridge, Gaylaw: Challenging the Apartheid of the Closet 375 (1999) (hereinafter Gaylaw). There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. J. Katz, Gay/Lesbian Almanac 29, 58, 663 (1983). Bowers' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "We think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Ante, at 156 L Ed 2d, at 521 (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. Gaylaw 375. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "consensual sexual relations conducted in private," ante, at 156 L Ed 2d, at 521, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code." Gaylaw 159.

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and traditions," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The Bowers majority opinion never relied on "values we share with a wider civilization," ante, at 156 L Ed 2d, at 524, but rather rejected the claimed right to sodomy on the ground that such a right was not "deeply rooted in this Nation's history and tradition," 478 U.S., at 193-194 (emphasis added). Bowers' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see id., at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on
sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence – indeed, with the jurisprudence of any society we know – that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," Bowers, supra, at 196 – the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. Bowers held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," ante, at 156 L Ed 2d, at 526 (emphasis added). The Court embraces instead Justice Stevens' declaration in his Bowers dissent, that "the fact that the 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." This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'Connor, ante, at 156 L Ed 2d, at 526 (opinion concurring in judgment), embraces: On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in Loving v. Virginia, 388 U.S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the partner was concerned. In Loving, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." Id., at 6, 11. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See Washington v. Davis, 426 U.S. 229, 241-242 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in Bowers – society's belief that certain forms of sexual behavior are "immoral and unacceptable," 478 US, at 196. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner – for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.
[Justice O'Connor's] reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See Romer, supra, at 653.

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is mandated by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see BSA v. Dale, 530 U.S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts –
or, for that matter, display any moral disapprobation of them – than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

As noted at § 25.1 nn.9-10, formalist and Holmesian judges tend to focus on the “history and traditions” branch of fundamental rights analysis, while instrumentalist and natural law judges are more willing to embrace the second branch of fundamental rights analysis concerning evolving standards of “conscience” and “requirements of a free society.” This is reflected in the difference between the majority and dissenting opinions in Lawrence.

In addition, with regard to “history and traditions,” formalists tend to restrict their analysis to the specific historical intent of the framers and ratifiers, rather than general kinds of historical evidence, and to specific traditions of our Nation. As Justice Scalia noted in Michael H. v. Gerald D.,

5 discussed at § 25.4.3 n.29, the Court should consider, and not disregard, "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” Further, in Stanford v. Kentucky, Justice Scalia’s plurality opinion argued that "traditions" must be established from sources of legislative enactments and their application by the executive branch, not from other kinds of indicia, such as public opinion polls, the view of interest groups, and the positions adopted by various professional associations. Legislative and executive practice is more certain and predictable than resort to these other kinds of evidence.

Supplementing this formalist approach, a Holmesian judge would also be willing to focus more fully on the purposes behind any constitutional text regarding any identified right, as well as any general views the framers and ratifiers may have had about a right and any general societal tradition. As Justice Holmes stated in Lochner v. New York, our tradition derives from both "our people and our laws." The Holmesian preference for deference to government, however, has meant that some Holmesian judges, despite considering these broader sources, have often in practice focused more heavily on specific historical intent and specific traditions, particularly as reflected in legislative and

5 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J., announcing the judgment of the Court).


7 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).
executive practice, as an aspect of deference to government. Thus, in *Stanford v. Kentucky*, Holmesians Chief Justice Rehnquist and Justice White joined Justice Scalia’s plurality opinion, which concluded that "traditions" must be established from legislative enactments and their executive application, not from social indicia of various kinds. So, too, Justice Rehnquist joined Justice Scalia’s view in *Michael H. v. Gerald D.*, that the Court should consider, and not disregard, "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”

Regarding the second branch of fundamental rights analysis, the Holmesian view focuses more on the broader language in *Palko* that asked whether the right is "so rooted in the traditions and collective conscience of the people as to be ranked as fundamental.” Reflecting the Holmesian broader focus on the history and traditions of our people from the Magna Carta in England in 1215 to the present, the classic Holmesian phrasing of what rights are fundamental are the rights that “those canons of decency and fairness which express the notions of justice of English-speaking peoples” indicate are fundamental, as stated by Justice Frankfurter in *Adamson v. California*, noted at § 14.3.1(C) n.67.

Under a natural law approach, full consideration is given not only to purposes behind the text, any general concept the framers and ratifiers had about a provision, and any general societal tradition, but also “penumbral” and “analogical” reasoning as part of “reasoned elaboration” of the law. Regarding the first branch of fundamental rights analysis, there is no Holmesian predisposition for deference to government, and societal traditions can be established by legislative and executive practice, or by social practice. As indicated by Justice O’Connor’s refusal to join Justice Scalia’s plurality opinion in *Stanford*, the natural law approach will be willing to consider other sources, including foreign sources, as long as they illuminate American history and traditions, particularly regarding natural law and the demands of human dignity, and are not a cover for imposing the judge’s own policy preferences. Justice Kennedy, who has an occasional predisposition for a formalist approach, as noted at § 1.1.2 & Table 3, joined Justice Scalia’s opinion in *Stanford*. However, Justice Kennedy backed away from this view in a number of subsequent cases, including *Atkins v. Virginia*, which ruled unconstitutional the death penalty for mentally retarded individuals;

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10 *Palko*, 302 U.S. at 325.

11 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

12 492 U.S. at 382 (O'Connor, J., concurring) (not willing to adopt Justice Scalia's approach, at least in this Eighth Amendment applied to the states through the 14th Amendment).

Roper v. Simmons,\(^\text{14}\) which overruled the specific holding in Stanford and held unconstitutional the death penalty applied to juveniles; and Lawrence v. Texas. In his majority opinion in Lawrence,\(^\text{15}\) Justice Kennedy relied in part upon broader arguments of social practice, including the “values we share with a wider civilization” and opinions of “the European Court of Human Rights.” Regarding the level of generality to view sources of fundamental rights, Justices O’Connor and Kennedy refused to joined Justice Scalia’s specific tradition approach in Michael H. v. Gerald D.,\(^\text{16}\) as noted at § 25.4.3 n.30, stating that they were not willing to "foreclose the unanticipated" by adopting Justice Scalia's approach which is "somewhat inconsistent with our past decisions in this area.”

Natural law Justices are willing to consider social practice from other countries particularly to the extent that practice helps illuminate a reasoned elaboration of a universal natural law concept placed into the Constitution, something judges did during the original natural law era.\(^\text{17}\) Since many of the framers and ratifiers believed in natural law, as noted at § 1.1.2 n.10 & § 25.4.4 nn.42-45, many of the individual rights in the Constitution were likely intended to have such a universal natural law base. Naturally, international sources that can best shed light on that natural law concept would most properly be used, such as European decisions regarding aspects of basic human rights and human dignity, discussed at § 1.1.4 nn.61-65. This explains why it was European views against banning homosexual sodomy, rather than views of other nations around the world which favor such a ban, that were used by Justice Kennedy in his opinion in Lawrence v. Texas.\(^\text{18}\) Similarly, natural law judges may be willing to let an evolving understanding of a natural law concept guide decisionmaking, on the ground that the framers and ratifiers of the provision would have wanted the judge to engage in such reasoning, and not be limited by their specific views. As Justice Kennedy noted at the end of his opinion in Lawrence, “Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once


\(^\text{16}\) Michael H., 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring).

\(^\text{17}\) See generally David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539 UCLA L. Rev. 539, 575-83 (2001) (discussing judicial practice from 1789 through the Civil War); Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int'l L. 1 (2006) (discussing cases where the Constitution refers to international law or international law is used as a background principle to identify the territorial scope of the Constitution, the powers of the national government, delineate structural relationships within the federal system, or individual rights cases).

thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Justice Souter made a similar point during his confirmation hearing in 1989 when he noted, "Principles don't change but our perceptions of the world around us and the need for those principles do.”

Instrumentalist Justices have asked what the "experience with the requirements of a free society" suggests about what fundamental rights exist, and are sensitive to the fact that terms like "liberty" or "property" are "broad and majestic terms" that involve consideration of generalized "interests and practices – freedom from physical restraint, marriage, childbearing, childrearing, and others." They emphatically reject Justice Scalia’s specific tradition approach to constitutional rights.

Under an instrumentalist approach, full consideration is given to considering purposes behind the text, any general concept or societal tradition, and reasoning based upon "penumbras" or "analogies" from constitutional provisions and precedents. In addition, instrumentalists are willing to consider arguments of sound social policy. For liberal instrumentalists, sound social policy usually means courts engaging in special scrutiny on the side of the unempowered in society, whether the indigent, the disadvantaged, criminal defendants, or individuals who wish to protest against the establishment. For instrumentalists, the definition of fundamental rights, as in *Duncan v. Louisiana*, is whether the rights are simply “part of the American scheme of justice,” as noted at § 14.3.1(D) n.68.

Further, because their focus is, in part, on sound social policy, instrumentalist judges will use the experience of other countries to determine what rights should be viewed as fundamental. As noted in Justice Brennan’s dissent in *Stanford*, “Where organizations with expertise in a relevant area have given careful consideration to the question . . . , there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards,” and these standards might involve legislative or social attitudes in “other countries.” Justice Stevens’ majority opinion in *Atkins v. Virginia* also supported use of international standards to consider sound social policy.


Commentators have also supported such use of a comparative perspective regarding world views on constitutional issues. This can involve not only views of other countries directly relevant to choices made by the framers and ratifiers, that is, “genealogical comparativism,” but also can involve “ahistorical comparativism,” that is, the view of other countries merely for their value in determining sound social policy.\textsuperscript{24} Because Holmesian and formalist jurists reject such use of social policy, they reject “ahistorical comparativism,” in favor of looking to comparative perspectives only to the extent they reflect “genealogical comparativism.”\textsuperscript{25} As Holmesian Chief Justice Rehnquist and formalist Justices Scalia and Thomas noted in dissent in Atkins v. Virginia,\textsuperscript{26} “[T]he Court’s decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls . . . finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any ‘permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved.’” Consistent with this premise, Chief Justice Rehnquist’s view was that only legislative and executive practice, in the form of “the work product of legislatures and sentencing jury determinations,” should be “the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.”

In his dissent in Lawrence, Justice Scalia noted that if the belief of a state’s citizens that certain forms of sexual behavior are "immoral and unacceptable" was not a legitimate interest, then “criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity” likewise were subject to constitutional attack. Reasoned elaboration of the law provides an answer to this


\textsuperscript{25} See, e.g., Diarmuid F. O'Scannlain, What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law, 80 Notre Dame L. Rev. 1893 (2005); Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 UCLA L. Rev. 639, 641-42 (2005) (“original intent,” that is formalist, and deference to “majoritarian” values, that is, Holmesian, approaches have little use for comparative constitutionalism, while “natural law” and “pragmatic,” that is, instrumentalist, approaches, have greater use for it.).

\textsuperscript{26} 536 U.S. 304, 322 324 (2002) (Rehnquist, J., joined by Scalia & Thomas, JJ., dissenting). On formalist and Holmesian use of international sources in constitutional interpretation, see generally Mark C. Rahdert, Comparative Constitutional Advocacy, 56 Am. U.L. Rev. 553, 554-60 (2007) (under formalist and Holmesian positivism, “foreign materials are at best irrelevant to American constitutional law, which requires interpretations of the language, structure, drafting and ratification of the U.S. Constitution, all of which are uniquely American legal questions.”).
critique. Since 1954, the Court has indicated that animus toward persons in interracial marriages, the mentally disabled, “hippie” communes, or gay and lesbian individuals is an illegitimate interest, as discussed at § 19.1 nn.31-35. This is based on the widely shared viewed that individuals deserve to be treated with equal concern and respect and not discriminated against for irrational reasons, even if those reasons are reflected in traditional customs or traditions. This “equal concern and respect” principle is reflected in the foundational religious doctrine of all major religions that affirm as moral the basic principle of “love of neighbor as thyself,” also phrased as the Golden Rule of “do unto others as you would have them do unto you.”

It is also reflected in secular philosophic doctrines: Adam Smith’s theory that an individual ought to act like an “impartial spectator,” giving equal weight to others’ interests as well as one’s own;

Immanuel Kant’s view that reason compels an individual “to act only in accordance with a principle that one could will to be a universal law” and for everyone “to treat others always as end-in-themselves, and not as a means to your ends”;

27 See generally Mark 12:31 (“Thou shalt love thy neighbor as thyself.”); Issac Herzog, 1 THE MAIN INSTITUTIONS OF JEWISH LAW 386 (Soncino Press 1936-39) (“[B]ring the law as much as possible into line with the highest ethical norms, already presided over the growth and development of Jewish law [which] commanded ‘Love thy neighbor as thyself’ and ‘Love the stranger as thyself.’ Leviticus xix, 19, 33-34.”), cited in Amihai Radzyner, Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time in the Field, 23 J. L. & Rel. 189, 208 (2007-2008); Geoffrey R. Stone, The World of the Framers: A Christian Nation?, 36 UCLA L. Rev. 1, 13 (2008) (“For Jefferson, the fundamental principles of morality, which he believed were held in common in all religions, were captured by Jesus’ maxims, ‘Treat others as you would have them treat you’ and ‘Love thy neighbor as thyself.’”), citing Kerry Walters, RATIONAL INFIDELS: THE AMERICAN DEISTS 181 (1992); Zainah Anwar & Jana S. Rumming, Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform, 64 Wash. & Lee L. Rev. 1529, 1541 (2007) (discussing “the recognition of equality between men and women in Islam, the imperative of ijihad (independent reasoning to arrive at a legal principle) in modern times, [and] the dynamics between what is universal for all times and what is particular to seventh century Arabia . . .”); Imam Feisal Abdul Rauf, What is Islamic Law, 57 Mercer L. Rev. 595, 599-600 (2006) (“Islamic Law, called Sharia, starts off from these two commandments” – “love the Lord thy God” and “love thy neighbor as thyself.”); R. Mary Hayden Lemmons, Tolerance, Society, and the First Amendment: Reconsiderations, 3 U. St. Thomas L.J. 75, 89 (2005) (“Hinduism: ‘One should never do that to another which one regards as injurious to one’s own self’; and Buddhism: ‘Hurt not others in ways that you yourself would find hurtful.’”).

28 ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 221 (1759), referenced at § 17.1.2 n.21.

29 See 1 ENCYCLOPEDIA OF ETHICS 666 (Becker & Becker eds. 1992) (“This yields the first formulation of Kant’s categorical imperative, the Formula of Universal Law: ‘Act only on a maxim which you can at the same time will to be a universal law. . . .This leads Kant to a new formulation of the categorical imperative: ‘Act always so that you treat humanity, in your own person or another, never merely as a means but also at the same time as an end in itself.’”), discussing Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785); IMMANUEL KANT, CRITIQUE OF PURE REASON (1788)).
Ronald Dworkin’s principle of “equal concern and respect” for others, based upon Dworkin’s view of the best interpretation of the existing moral principles of Western industrialized societies,30 and John Rawls’ principle that justice derives from individuals agreeing upon rules from “an original position” where no individual will be favored,31 among others.32

Giving persons equal concern and respect naturally means, as a corollary, that “arbitrary coercion is wrong.” Coercive sexual practices, as well as exploitative sexual practices, even if not directly coercive, violate the principle of equal concern and respect. Such principles as “equal concern and respect” and “arbitrary coercion is wrong” make it possible to draw distinctions among Justice Scalia’s legislative list, stated above. Bestiality can be prohibited as there can be no meaningful consent given by animals. Such acts are thus always exploitative to an extent, and more exploitative, of course, where the animal is the passive recipient of the human aggression. Prostitution or obscene speech that “lacks serious literary, artistic, political, or scientific value”33 also raise clear issues of exploitative sexual activity. Bigamy (or polygamy) raises issues of whether one can give equal concern and respect to multiple spouses, particularly given the historical practice of exploitation of women that has often accompanied societies permitting men to have multiple wives.34 Concerns with the possibility of inevitable exploitation of deep emotions built up between family members suggest consent could never be truly non-exploitative in the context of adult incest. Further, as a matter of “history and tradition,” the first branch of substantive due process analysis, the legislative practice of virtually every state banning obscenity, prostitution, bigamy and polygamy, and incest, and a vast majority (44 of 50) banning bestiality, is different than only 13 states banning sodomy when Lawrence was decided (or less than 20 states having death penalty for the mentally retarded in Atkins, cited at § 27.1.1 n.13, or death penalty for juveniles in Roper, cited at § 27.1.1 n.14).

On the other hand, it may well be true that any attempt to regulate fornication would raise difficult problems of justification. Even with respect to adultery, while adulterous conduct in most circumstances would violate the principle of giving one’s spouse equal concern and respect—though it would be different if both parties knowingly and voluntarily agreed to have an “open marriage”

30 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-73 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”).


34 On the topic of polygamy, see generally Cyra Akila Choudhury, Between Traditions and Progress: A Comparative Perspective on Polygamy in the United States and India, 83 U. Colo. L. Rev. 963 (2012).
the question would arise whether this morality is a matter for state regulation or for private individual response, such as filing for divorce. Few states have criminal laws against fornication still on their books, and only a dozen or so states still have civil actions for alienation of affection. Around 20 states still have laws criminalizing adultery, but such laws are almost never enforced, with very modest penalties when enforced. Thus, the legislative and executive practice with respect to fornication and adultery is much like Lawrence. That such laws exist, however, can make a difference in divorce cases regarding custody and financial arrangements, or other civil contexts, such as barring a tort case involving herpes transmission, or refusing to extend to cohabiters protection under laws prohibiting housing discrimination, if adultery or fornication has taken place.35 The issue of the constitutionality of same-sex marriage is discussed at § 23.4.3 nn.46-60.

35 See generally Martin v. Ziherl, 607 S.E.2d 367, 369-71 (Va. 2005) (fornication statute unconstitutional after Lawrence, and thus fornication no longer a bar to suit for herpes transmission); Gabrielle Viator, Note, The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas, 39 Suffolk U.L. Rev. 837 (2006) (23 states continue to recognize adultery as a crime, although statutes rarely enforced); Hillary Greene, Note, Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation, 16 Yale L. & Pol’y Rev. 169, 174-78 (1997). For an article underscoring that regulation on grounds of traditional “morals” was accepted during the formalist era, from 1873-1937, but that during the instrumentalist and modern natural law eras, 1954-today, the Court has almost never upheld a statute based on “moral” grounds alone, with the exception of Bowers v. Hardwick, which is now overruled, see Suzanne B. Goldberg, Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas, 88 Minn. L. Rev. 1233, 1247-58 (2004).

Meanwhile, the Eighth Circuit Court of Appeals considered the case of a defendant who had photographed a nude minor engaged in sexual activity and sent a copy over the Internet. In United States v. Bach, the defendant argued that under Lawrence v. Texas he had a protected privacy interest in this form of expression. The court upheld defendant’s conviction for child pornography, stating that Lawrence involved private and consensual sexual conduct between same sex adults. It did not involve minors or others who might be injured or coerced.

Although Justice Kennedy’s opinion in Lawrence dodged the issue of there is a fundamental right to sexual privacy, some lower federal courts have so held. For example, even before Lawrence, in 2002, a district court concluded in Williams v. Pryor that “undisputed evidence has shown that there is a historical practice and contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity, and, a concomitant avoidance of prosecutions against married and unmarried persons for violations of statutes that proscribe consensual sexual activity.” Thus, the court held unconstitutional under strict scrutiny an Alabama statute prohibiting the distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs.” The Court said that the statute was not narrowly tailored to advance any possible compelling interest, such as protecting children from being exposed to obscene devices or regulating “commerce of sexual stimulation and auto-eroticism, for its own sake.” After Lawrence, a general interest in advancing the state’s view of public morality – even if expressed as a concern with the “commerce of sexual stimulation” – might well be viewed as an illegitimate interest, reflecting animus toward persons wishing to use such devices for their “orderly pursuit of happiness.”

On appeal, in Williams v. Attorney General of Alabama, a 2-1 panel of the Eleventh Circuit rejected the district court’s strict scrutiny analysis and upheld the statute under minimum rationality review, noting that Lawrence did not involve a fundamental rights analysis. As the dissent pointed out, even in the absence of a fundamental right, the statute must survive minimum rationality review, and after Lawrence the bare assertion of promotion of public morality is not sufficient to overcome a concern with animus. In passing, the majority responded to this concern by stating that the statute was rationally related to the legitimate police power of “restricting the sale of sex.” As of 2006, courts in Colorado, Kansas, and Louisiana had struck down similar laws on right of privacy grounds, while courts in Georgia, Mississippi, and Texas, like Alabama, had upheld them.

Reflecting the post-*Lawrence* trend among courts that regulations in a few states which ban the sale of “sex toys” are unconstitutional, the Fifth Circuit concluded in *Reliable Consultants, Inc v. Earle*, 41 that the Texas state law banning such sales was unconstitutional, relying *Lawrence v. Texas*. The Georgia obscene-device statute was struck down in *This, That, and the Other Gift and Tobacco, Inc. v. Cobb County*. 42 Regarding such laws in Alabama, Mississippi, and Virginia, given the fact that Mississippi is within the Fifth Circuit, it is likely that any attempt to enforce that law would be viewed as unconstitutional by the Fifth Circuit. Given the Virginia Supreme Court’s opinion in *Martin v. Zihert*, 43 cited at § 27.1.1 n.35, striking down Virginia’s fornication statute after *Lawrence*, it is likely the Virginia Supreme Court would strike down its state’s law were it ever enforced. The 11th Circuit did uphold the Alabama ban on sex toys being sold in the state in *Williams v. Morgan*. 44

In *Paschal v. State*, 45 the Arkansas Supreme Court ruled that a state statute making it a crime for a teacher to have sex with a student under the age of 21, applied to a consensual relationship with an 18-year-old student, was an unconstitutional infringement on the individual’s right, under the Arkansas Constitution, to engage in private, consensual, noncommercial acts of sexual intimacy between adults. Other courts, focused on the United States Constitution, had held there is no such fundamental right, and under minimum rationality review have upheld bans on teacher/student sex. 46

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41 517 F.3d 738 (5th Cir. 2008). This ruling conflicts with a pre-*Lawrence* decision by a Texas state court of appeals, *Webber v. Texas*, 21 S.W.3d 726 (2000), upholding such a law. Texas state officials are likely to follow the more recent Fifth Circuit opinion, although it cannot, strictly speaking, overrule the Texas state court opinion, as discussed at § 2.2.2 n.33.


43 607 S.E.2d 367 (Va. 2005).

44 478 F.3d 1316, 1322 (11th Cir. 2007) (regarding Alabama law, while *Lawrence* did ban public morality as legitimate basis to regulate private, non-commercial conduct, it did not ban public morality as legitimate to regulate public, commercial conduct). But see Flanigan’s Enterprises Inc. of Georgia v. City of Sandy Springs, Georgia, 831 F.3d 1342 (11th Cir. 2016) (local ordinance in Georgia banning sale of sex toys constitutional based on earlier 11th Circuit precedent; panel “encourages” plaintiffs to petition 11th Circuit for en banc review), vacated as moot, 868 F.3d 1248 (11th Cir. 2017) (7-5 en banc) (case mooted when legislation repealed; dissent would hold, citing cases, that plaintiff’s claim for nominal damages saves case from mootness).


2. Decisional Privacy Regarding Rights to Refuse Medical Treatment

Another area where the Justices have struggled with whether to find a fundamental right occurred in *Cruzan v. Director, Missouri Department of Health*. In *Cruzan*, the parents of an incompetent patient sought and were granted a court order authorizing the removal of lifesaving nutrition and hydration equipment. The state Supreme Court reversed, holding that the state had a strong policy favoring the preservation of life and that “clear and convincing” evidence had not been presented that the patient would wish to die under the circumstances. In 1990, the Supreme Court affirmed. Chief Justice Rehnquist wrote that prior decisions sustained the existence in a competent person of a constitutionally protected “significant” liberty interest, although not necessarily a fundamental right, to refuse unwanted medical treatment. Applying some form of rational basis review, that interest was balanced in *Cruzan* against state interests in protecting the element of choice against potential abuses and asserting its interest in preserving human life. The Court held that these state interests were permissibly advanced by applying a “clear and convincing” standard to determine the patient's wishes, rather than the normal burden in a civil proceeding of a “preponderance” of the evidence. In part, this was because the state may place an increased risk of an erroneous decision on those seeking to terminate an incompetent person’s life. Justice Scalia, concurring, said that there could be no claim that substantive due process has been denied unless the state has deprived an individual of a right historically and traditionally protected against state interference, citing *Michael H.*, *Bowers*, and *Moore*. Historically, there has been no recognition of a right to commit suicide.

Justice O’Connor, concurring, as the critical fifth vote, indicated her belief that a liberty interest did exist to refuse unwanted medical treatment. By writing a concurrence, this suggested a greater willingness to call this a fundamental right, different than the majority opinion. However, Justice O’Connor predominantly focused on the holding of the case, which was that the state was permitted to require “clear and convincing evidence of Nancy Cruzan’s desire to have artificial hydration and nutrition withdrawn.” A similar issue was raised in 2005 in the case of Terry Schiavo, with the courts ruling that the legal surrogate, Ms. Schiavo’s husband, did present clear and convincing evidence that Ms. Schiavo would have wanted artificial hydration and nutrition withdrawn.

Justice Brennan, joined by Justices Marshall and Blackmun, dissented in *Cruzan*. Brennan said the right to be free from unwanted medical treatment is fundamental. The state's only legitimate interest where the patient is incompetent is to safeguard the accuracy of a determination of the patient's intent. However, the clear and convincing evidentiary standard is an obstacle to the exercise of the

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47 497 U.S. 261, 278-85 (1990); id. at 292-94 (Scalia, J., concurring).


fundamental right because no proof is required to support a finding that the incompetent person would wish to continue treatment. Justice Stevens also dissented, arguing that the state's evidence rule interfered with the exercise of a right so rooted in traditions and conscience to be fundamental – the freedom to come to terms with the conditions of one's own mortality.\textsuperscript{50}

In \textit{Compassion in Dying v. State of Washington},\textsuperscript{51} the Ninth Circuit Court of Appeals held that there was a constitutional right to physician-assisted suicide, reasoning that such a right was “similar” to the fundamental rights discussed in \textit{Planned Parenthood v. Casey}, based on \textit{Casey}'s language that at “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” The Supreme Court reversed in \textit{Washington v. Glucksberg},\textsuperscript{52} stating that any such “similarity” was not sufficient to recognize such a new constitutional right given no text, context, or history of the 14th Amendment supported a right to physician-assisted suicide, and legislative and executive practice in 49 of the 50 States, with the exception of Oregon, rejected such a right. Further, social practices in other Western industrialized countries, with rare exceptions, refused to grant such a right. In addition, the core holdings of precedent had never supported a right to physician-assisted suicide. All these reasons were more weighty than general reasoning about rights based upon \textit{Casey}'s “heart of liberty” language.

\textbf{Washington v. Glucksberg}  
\textit{521 U.S. 702 (1997)}

Chief Justice REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "causing" or "aiding" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self-murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Wash. Rev. Code 9A.36.060(1) (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine. §§ 9A.36.060(2) and 9A.20.021(1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." Wash. Rev. Code § 70.122.070(1).

\textsuperscript{50} \textit{Id.} at 301-02 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting); \textit{id.} at 330-32 (Stevens, J., dissenting).

\textsuperscript{51} 79 F.3d 790, 813-14 (9th Cir. 1996) (\textit{en banc} opinion), \textit{quoting} Casey, 505 U.S. 833, 851 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

\textsuperscript{52} 521 U.S. 702, 735 (1997).
Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M.D., Abigail Halperin, M.D., Thomas A. Preston, M.D., and Peter Shalit, M.D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban. In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States District Court, seeking a declaration that Wash. Rev. Code 9A.36.060(1) (1994) is, on its face, unconstitutional. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (WD Wash. 1994).

We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices. See, e.g., Casey, 505 U.S. at 849-850; Cruzan, 497 U.S. at 269-279; Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (noting importance of "careful 'respect for the teachings of history'"). In almost every State – indeed, in almost every western democracy – it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Cruzan, 497 U.S. at 280 ("The States – indeed, all civilized nations – demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide"); see Stanford v. Kentucky, 492 U.S. 361, 373 (1989) ("The primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide – and, therefore, of assisting suicide – are consistent and enduring themes of our philosophical, legal, and cultural heritages. See generally, Marzen, O'Dowd, Crone & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 17-56 (1985) (hereinafter Marzen); New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 77-82 (May 1994) (hereinafter New York Task Force).

More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. Cruzan, 497 U.S. at 294-295 (Scalia, J., concurring). In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that "just as a man may commit felony by slaying another so may he do so by slaying himself." 2 Bracton on Laws and Customs of England 423 (f. 150) (G. Woodbine ed., S. Thorne transl., 1968).

For the most part, the early American colonies adopted the common-law approach. For example, the legislators of the Providence Plantations, which would later become Rhode Island, declared, in 1647, that "self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: . . . his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing." The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, p. 19 (J. Cushing ed. 1977). Virginia also required ignominious burial for suicides, and their estates were forfeit to the crown. A. Scott, Criminal Law in Colonial Virginia 108, and n.93, 198, and n.15 (1930).
Over time, however, the American colonies abolished these harsh common-law penalties. William Penn abandoned the criminal-forfeiture sanction in Pennsylvania in 1701, and the other colonies (and later, the other States) eventually followed this example. Cruzan, 497 U.S. at 294 (Scalia, J., concurring). Zephaniah Swift, who would later become Chief Justice of Connecticut, wrote in 1796 that "there can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting of a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. . . . [Suicide] is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment." 2 Z. Swift, A System of the Laws of the State of Connecticut 304 (1796).

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide. Swift, in his early 19th century treatise on the laws of Connecticut, stated that "if one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." 2 Z. Swift, A Digest of the Laws of the State of Connecticut 270 (1823). This was the well established common-law view, see In re Joseph G., 667 P. 2d 1176, 1179 (Cal. 1983); Commonwealth v. Mink, 123 Mass. 422, 428 (1877) ("Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder") (quoting Chief Justice Parker's charge to the jury in Commonwealth v. Bowen, 13 Mass. 356 (1816)), as was the similar principle that the consent of a homicide victim is "wholly immaterial to the guilt of the person who caused [his death]." 3 J. Stephen, A History of the Criminal Law of England 16 (1883); see 1 F. Wharton, Criminal Law §§ 451-452 (9th ed. 1885); Martin v. Commonwealth, 37 S.E.2d 43, 47 (Va. 1946) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable"). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "the life of those to whom life had become a burden — of those who [were] hopelessly diseased or fatally wounded — nay, even the lives of criminals condemned to death, [were] under the protection of law, equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live." Blackburn v. State, 23 Ohio St. 146, 163 (1872); see Bowen, supra, at 360 (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, Act of Dec. 10, 1828, ch. 20, § 4, 1828 N. Y. Laws 19 (codified at 2 N. Y. Rev. Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829)), and many of the new States and Territories followed New York's example. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnishing another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." Id., at 76-77. By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. See Cruzan, supra, at 294-295 (Scalia, J., concurring).

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are
increasingly likely to die in institutions, from chronic illnesses. President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 16-18 (1983). Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. See Vacco v. Quill, 79 F.3d, at 818-820; People v. Kevorkian, 527 N.W.2d 714, 731-732, nn. 53-56 (Mich. 1994). At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.


California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults. Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted. And just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. See Iowa Code Ann. §§ 707A.2, 707A.3 (Supp. 1997); R.I. Gen. Laws §§ 11-60-1, 11-60-3 (Supp. 1996). Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pub. L. 105-12, 111 Stat. 23 (codified at 42 U.S.C. § 14401 et seq).

The States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law – an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen – was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." New York Task Force vii. Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. Id., at 118-119. After studying physician-assisted suicide, however, the Task Force unanimously concluded that "legalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable . . . . The potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved." Id., at 120. Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and
notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, ibid; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Casey, supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. Cruzan, 497 U.S. at 278-279. But we "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins, 503 U.S. at 125. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," ibid, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, Moore, 431 U.S. at 502 (plurality opinion).

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," id., at 503 (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Flores, supra, at 302; Collins, supra, at 125; Cruzan, supra, at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking." Collins, supra, at 125, that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S. at 302.

Here, as discussed above, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. See Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it"); Flores, 507 U.S. at 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it").
The Court of Appeals, like the District Court, found *Casey* "highly instructive" and "almost prescriptive" for determining "what liberty interest may inhere in a terminally ill person's choice to commit suicide": "Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'" 79 F.3d, at 813-814. Similarly, respondents emphasize the statement in *Casey* that: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey*, 505 U.S. at 851. Brief for Respondents 12.

By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise*." *Casey*, 505 U.S. at 852 (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973), and *Casey* did not suggest otherwise.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. See *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). This requirement is unquestionably met here.

First, Washington has an "unqualified interest in the preservation of human life." *Cruzan*, 497 U.S. at 282. The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See id., at 280; Model Penal Code § 210.5, Comment 5, at 100 ("The interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another").

This interest is symbolic and aspirational as well as practical: "While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." New York Task Force 131-132.

between the ages of 14 and 54); New York Task Force 10, 23-33 (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and the elderly). The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. See 79 F.3d, at 820; id., at 854 (Beezer, J., dissenting) ("The state recognizes suicide as a manifestation of medical and psychological anguish").

Those who attempt suicide – terminally ill or not – often suffer from depression or other mental disorders. See New York Task Force 13-22, 126-128 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 10-11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919, 924 (1996) ("Intolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia"). Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. H. Hendin, Seduced by Death: Doctors, Patients and the Dutch Cure 24-25 (1997) (suicidal, terminally ill patients "usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive"); New York Task Force 177-178. The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. Id., at 175. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," 79 F.3d, at 827, the American Medical Association, like many other medical and physicians' groups, has concluded that "physician-assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics § 2.211 (1994); see Council on Ethical and Judicial Affairs, Decisions Near the End of Life, 267 JAMA 2229, 2233 (1992) ("The societal risks of involving physicians in medical interventions to cause patients' deaths is too great"); New York Task Force 103-109 (discussing physicians' views). And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 355-356 (1996).

Next, the State has an interest in protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." 79 F.3d, at 825. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. Cruzan, 497 U.S. at 281. Similarly, the New York Task Force warned that "legalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable. . . . The risk of harm is greatest for the many individuals in
our society whose autonomy and well-being are already compromised by poverty, lack of access to
good medical care, advanced age, or membership in a stigmatized social group." New York Task
Force 120; see Compassion in Dying, 49 F.3d, at 593 ("An insidious bias against the handicapped
– again coupled with a cost-saving mentality – makes them especially in need of Washington's
statutory protection"). If physician-assisted suicide were permitted, many might resort to it to spare
their families the substantial financial burden of end-of-life health-care costs.

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary
and perhaps even involuntary euthanasia. The Court of Appeals struck down Washington's assisted-
suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by
obtaining medication prescribed by their doctors." 79 F.3d, at 838. Washington insists, however, that
the impact of the court's decision will not and cannot be so limited. Brief for Petitioners 44-47. If
suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the
United States must enjoy it." Compassion in Dying, 49 F.3d, at 591; see Kevorkian, 527 N.W.2d,
at 727-728, n.41. The Court of Appeals' decision, and its expansive reasoning, provide ample support
for the State's concerns. The court noted, for example, that the "decision of a duly appointed
surrogate decision maker is for all legal purposes the decision of the patient himself," 79 F.3d, at
832, n.120; that "in some instances, the patient may be unable to self-administer the drugs and . . .
administration by the physician . . . may be the only way the patient may be able to receive them,"
id., at 831; and that not only physicians, but also family members and loved ones, will inevitably
participate in assisting suicide. Id., at 838, n.140. Thus, it turns out that what is couched as a limited
right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove
extremely difficult to police and contain.

This concern is further supported by evidence about the practice of euthanasia in the Netherlands.
The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary
euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of
assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to
these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered
lethal morphine overdoses without the patients' explicit consent. Physician-Assisted Suicide and
Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, at 12-13 (citing Dutch
study). This study suggests that, despite the existence of various reporting procedures, euthanasia
in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical
suffering, and that regulation of the practice may not have prevented abuses in cases involving
vulnerable persons, including severely disabled neonates and elderly persons suffering from
dementia. Id., at 16-21; see generally C. Gomez, Regulating Death: Euthanasia and the Case of the
The New York Task Force, citing the Dutch experience, observed that "assisted suicide and
euthanasia are closely linked," New York Task Force 145, and concluded that the "risk of . . . abuse
is neither speculative nor distant," id., at 134. Washington, like most other States, reasonably ensures
against this risk by banning, rather than regulating, assisting suicide. See United States v. 12 200-ft
Reels of Super 8MM Film, 413 U.S. 123, 127 (1973) ("Each step, when taken, appears a reasonable
step in relation to that which preceded it, although the aggregate or end result is one that would
never have been seriously considered in the first instance").
We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that Wash. Rev. Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F.3d, at 838.


3. Decisional Privacy and Curfew Statutes

Another privacy issue concerns whether parents, under their fundamental right to child-rearing, addressed at § 25.4.3, or minors, as part of a fundamental “freedom from bodily restraint,” noted at § 28.2.3 nn.27-30, can challenge successfully curfew statutes applied to minors. Typically, such laws are upheld under some form of rational basis review, consistent with the statutes being a less than substantial burdens on a fundamental right. Other times they are upheld under strict scrutiny, or intermediate review, similar to the post-Roe cases involving abortion rights for minors, noted at § 26.1 n.5, based on the vulnerability of children and their lesser ability to make informed decisions. Curfew statutes burdening adult’s “freedom from bodily restraint” would trigger strict scrutiny.\footnote{See Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (intermediate review); Charles W. Gerdes, Note, Juvenile Curfew Challenges in the Federal Courts: A Constitutional Conundrum Over the (Less Than) Fundamental Rights of Minors, 11 St. Thomas L. Rev. 395 (1999).}

\section*{§ 27.2 Disclosure Privacy versus Decisional Privacy Rights}

A collateral development of the privacy doctrine occurred in 1977 when the Court said in Whalen v. Roe\footnote{429 U.S. 589, 599-600 (1977).} that the "privacy" cases have involved at least two different kinds of interests. “One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” The previously discussed fundamental rights cases in Chapters 25-26 and §§ 27.1.1, 27.1.2 & 27.1.3, have all involved this
second interest – independence in making certain kinds of important decisions. *Whalen* involved the first kind of interest – an interest in avoiding disclosure of personal matters. The constitutional question presented in *Whalen* was whether a state could record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor’s prescription, certain drugs for which there is both a lawful and an unlawful market. Because of safeguards in the statute protecting privacy, the Court concluded that the program did not pose “a sufficiently grievous threat” to trigger any kind of heightened scrutiny. Given this less than substantial burden, the Court then applied a “second-order” reasonableness review kind of analysis, concluding, “There surely was nothing unreasonable in the assumption that the patient identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs.”

A similar case of reasonableness review being applied in a “disclosure privacy” case occurred in *C.N. v. Ridgewood Board of Education.*

55 In this case, the court was confronted a school survey on sexual activity, drug use, and participation in various kinds of extra-curricular activities, that in practice was deemed by the court to be involuntary for the students to take. Because the surveys were structured to be anonymous, any risk of disclosure of personal information was minimal. The Court thus applied a “second-order” reasonableness balancing test, noting that the factors to be considered in the balance included: "the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." Given the safeguards to ensure the anonymous nature of the survey, and the fact the survey was an attempt to obtain information “directly related to the understanding and prevention of the social problems confronting today's youth – a laudable goal,” the court granted a summary judgment on behalf of the school district on the disclosure privacy claim.

As in *Whalen v. Roe*, the Court applied reasonableness review in *National Aeronautics and Space Administration v. Nelson.*

56 The Court held that assuming, without deciding, that the Constitution protects a right to informational privacy, that NASA questions about an employee’s prior drug use and open-ended questions to references about whether they had a reason to question the employee’s honesty or trustworthiness did not violate such a right. Justices Scalia and Thomas would have held that no constitutional right to informational privacy exists.57

55 430 F.3d 159, 179-82 (3d Cir. 2005). See also Greenville Women’s Clinic v. Commissioner, South Carolina Dep’t of Health & Envir. Control, 317 F.3d 357, 367-71 (4th Cir. 2002), cert. denied, 538 U.S. 1008 (2003) (regulation authorizing state health inspectors to review and copy abortion clinic records, as part of state responsibility to monitor and investigate complaints against clinics, while requiring that patient records be kept confidential, constitutional under rational review).


57 Id. at 764 (Scalia, J., joined by Thomas, J., concurring in the judgment). See also *Wyatt v. Fletcher*, 718 F.3d 496, 505-10 (5th Cir. 2013) (coach has qualified immunity as no clearly
established constitutional right for a minor not to have her coach “out” her as possibly being a lesbian to the minor’s parents). But see Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3rd Cir. 2000) (“sexual orientation [is] an intimate aspect of his personality entitled to privacy protection under Whalen”); Powell v. Schriver, 175 F.3d 107, 111 (2nd Cir. 1999) (Constitution does “protect the right to maintain the confidentiality of one’s transsexualism.”).

Griffin involved an Illinois rule that effectively conditioned thoroughgoing appeals from criminal convictions on the defendant's procurement of a transcript of trial proceedings. See id., at 13-14, and nn.2, 3 (noting, inter alia, that “mandatory record,” which an indigent defendant could obtain free of charge, did not afford the defendant an opportunity to seek review of trial errors). Indigent defendants, other than those sentenced to death, were not excepted from the rule, so in most cases, defendants without means to pay for a transcript had no access to appellate review at all. Although the Federal Constitution guarantees no right to appellate review, id., at 18, once a State affords that right, Griffin held, the State may not “bolt the door to equal justice,” id., at 24 (Frankfurter, J., concurring in judgment).

The plurality in Griffin recognized “the importance of appellate review to a correct adjudication of guilt or innocence.” Id., at 18. “[T]o deny adequate review to the poor,” the plurality observed, “means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.” Id., at 19. Judging the Illinois rule inconsonant with the Fourteenth Amendment, the Griffin plurality drew support from the Due Process and Equal Protection Clauses. Id., at 13.

Justice Frankfurter, concurring in the judgment in Griffin, emphasized and explained the decision's equal protection underpinning: “Of course a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review. . . .” Id., at 23.

Of prime relevance to the question presented by M.L.B.'s petition, Griffin's principle has not been confined to cases in which imprisonment is at stake. The key case is Mayer v. Chicago, 404 U.S. 189 (1971). Mayer involved an indigent defendant convicted on nonfelony charges of violating two city ordinances. Fined $250 for each offense, the defendant petitioned for a transcript to support his appeal. He alleged prosecutorial misconduct and insufficient evidence to convict. The State provided free transcripts for indigent appellants in felony cases only. We declined to limit Griffin to cases in which the defendant faced incarceration. “The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay,” the Court said in Mayer, “is not erased by any differences in the sentences that may be imposed.” 404 U.S., at 197. Petty offenses could entail serious collateral consequences, the Mayer Court noted. Ibid. The Griffin principle, Mayer underscored, “is a flat prohibition,” 404 U.S., at 196, against “making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay,” id., at 197, 92 S.Ct., at 416. An impeccunious party, the Court ruled, whether found guilty of a felony or conduct only “quasi criminal in nature,” id., at 196, “cannot be denied a record of sufficient completeness to permit proper [appellate] consideration of his claims,” id., at 198 (internal quotation marks omitted).

In contrast to the “flat prohibition” of “bolted doors” that the Griffin line of cases securely established, the right to counsel at state expense, as delineated in our decisions, is less encompassing. A State must provide trial counsel for an indigent defendant charged with a felony, Gideon v. Wainwright, 372 U.S. 335, 339 (1963), but that right does not extend to nonfelony trials
if no term of imprisonment is actually imposed, Scott v. Illinois, 440 U.S. 367, 373-374 (1979). A State's obligation to provide appellate counsel to poor defendants faced with incarceration applies to appeals of right. Douglas v. California, 372 U.S. 353, 357 (1963). In Ross v. Moffitt, however, we held that neither the Due Process Clause nor the Equal Protection Clause requires a State to provide counsel at state expense to an indigent prisoner pursuing a discretionary appeal in the state system or petitioning for review in this Court. 417 U.S., at 610, 612, 616-618.

We have also recognized a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees. In Boddie v. Connecticut, 401 U.S. 371 (1971), we held that the State could not deny a divorce to a married couple based on their inability to pay approximately $60 in court costs. Crucial to our decision in Boddie was the fundamental interest at stake. “[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship,” we said, due process “prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.” Id., at 374; see also Little v. Streater, 452 U.S. 1, 13-17 (1981) (State must pay for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit).

Soon after Boddie, in Lindsey v. Normet, 405 U.S. 56 (1972), the Court confronted a double-bond requirement imposed by Oregon law only on tenants seeking to appeal adverse decisions in eviction actions. We referred first to precedent recognizing that, “if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review.” Id., at 77. We next stated, however, that “[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.” Ibid. Oregon's double-bond requirement failed equal protection measurement, we concluded, because it raised a substantial barrier to appeal for a particular class of litigants – tenants facing eviction – a barrier “faced by no other civil litigant in Oregon.” Id., at 79. The Court pointed out in Lindsey that the classification there at issue disadvantaged nonindigent as well as indigent appellants, ibid.; the Lindsey decision, therefore, does not guide our inquiry here.

The following year, in United States v. Kras, 409 U.S. 434 (1973), the Court clarified that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule. Kras concerned fees, totaling $50, required to secure a discharge in bankruptcy. Id., at 436. The Court recalled in Kras that “[o]n many occasions we have recognized the fundamental importance . . . under our Constitution” of “the associational interests that surround the establishment and dissolution of th[e] [marital] relationship.” Id., at 444. But bankruptcy discharge entails no “fundamental interest,” we said. Id., at 445. Although “obtaining [a] desired new start in life [is] important,” that interest, the Court explained, “does not rise to the same constitutional level” as the interest in establishing or dissolving a marriage. Ibid. Nor is resort to court the sole path to securing debt forgiveness, we stressed; in contrast, termination of a marriage, we reiterated, requires access to the State's judicial machinery. Id., at 445-446; see Boddie, 401 U.S., at 376.

In Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam), the Court adhered to the line drawn in Kras. The appellants in Ortwein sought court review of agency determinations reducing their
welfare benefits. Alleging poverty, they challenged, as applied to them, an Oregon statute requiring appellants in civil cases to pay a $25 fee. We summarily affirmed the Oregon Supreme Court's judgment rejecting appellants' challenge. As in Kras, the Court saw no "fundamental interest . . . gained or lost depending on the availability" of the relief sought by [the complainants].” 410 U.S., at 659 (quoting Kras, 409 U.S., at 445). Absent a fundamental interest or classification attracting heightened scrutiny, we said, the applicable equal protection standard “is that of rational justification,” a requirement we found satisfied by Oregon's need for revenue to offset the expenses of its court system. 410 U.S., at 660 . . .

In sum, as Ortwein underscored, this Court has not extended Griffin to the broad array of civil cases. But tellingly, the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion. Cf. Moore v. East Cleveland, 431 U.S. 494 (1977).

Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as “of basic importance in our society,” Boddie, 401 U.S., at 376, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. See, for example, Turner v. Safley, 482 U.S. 78 (1987), Zablocki v. Redhail, 434 U.S. 374 (1978), and Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923) (raising children). M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake. We approach M. L. B.'s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point: Lassiter v. Department of Social Servs. of Durham Cty., 452 U.S. 18 (1981), and Santosky v. Kramer, 455 U.S. 745 (1982).

Lassiter concerned the appointment of counsel for indigent persons seeking to defend against the State's termination of their parental status. The Court held that appointed counsel was not routinely required to assure a fair adjudication; instead, a case-by-case determination of the need for counsel would suffice, an assessment to be made “in the first instance by the trial court, subject . . . to appellate review.” 452 U.S., at 32.

Santosky held that a “clear and convincing” proof standard is constitutionally required in parental termination proceedings. 455 U.S., at 769-770. In so ruling, the Court again emphasized that a termination decree is “final and irrevocable.” Id., at 759 (emphasis in original). “Few forms of state action,” the Court said, “are both so severe and so irreversible.” Ibid. As in Lassiter, the Court characterized the parent's interest as “commanding,” indeed, “far more precious than any property right.” 455 U.S., at 758-759.

Although both Lassiter and Santosky yielded divided opinions, the Court was unanimously of the view that “the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.” 455
U.S., at 774 (Rehnquist, J., dissenting). It was also the Court's unanimous view that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” Id., at 787.

Guided by this Court's precedent on an indigent's access to judicial processes in criminal and civil cases, and on proceedings to terminate parental status, we turn to the classification question this case presents: Does the Fourteenth Amendment require Mississippi to accord M.L.B. access to an appeal – available but for her inability to advance required costs – before she is forever branded unfit for affiliation with her children?

We observe first that the Court's decisions concerning access to judicial processes, commencing with Griffin and running through Mayer, reflect both equal protection and due process concerns. See Ross v. Moffitt, 417 U.S., at 608-609. As we said in Bearden v. Georgia, 461 U.S. 660, 665 (1983), in the Court's Griffin-line cases, “[d]ue process and equal protection principles converge.” The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. See Griffin, 351 U.S., at 23 (Frankfurter, J., concurring in judgment). The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. See Ross, 417 U.S., at 609. A “precise rationale” has not been composed, id., at 608, because cases of this order “cannot be resolved by resort to easy slogans or pigeonhole analysis,” Bearden, 461 U.S., at 666. Nevertheless, “[m]ost decisions in this area,” we have recognized, “res[tt] on an equal protection framework,” id., at 665, as M.L.B.'s plea heavily does, for, as we earlier observed, due process does not independently require that the State provide a right to appeal. We place this case within the framework established by our past decisions in this area. In line with those decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other. See Bearden, 461 U.S., at 666-667.

We now focus on Mayer and the considerations linking that decision to M.L.B.'s case. Mayer applied Griffin to a petty offender, fined a total of $500, who sought to appeal from the trial court's judgment. See Mayer, 404 U.S., at 190. An “impecunious medical student,” id., at 197, the defendant in Mayer could not pay for a transcript. We held that the State must afford him a record complete enough to allow fair appellate consideration of his claims. The defendant in Mayer faced no term of confinement, but the conviction, we observed, could affect his professional prospects and, possibly, even bar him from the practice of medicine. Ibid. The State's pocketbook interest in advance payment for a transcript, we concluded, was unimpressive when measured against the stakes for the defendant. Ibid.

Similarly here, the stakes for petitioner M.L.B. – forced dissolution of her parental rights – are large, “more substantial than mere loss of money.” Santosky, 455 U.S., at 756 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)). In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is “irretrievable[y] destruct[ive]” of the most fundamental family relationship. Santosky, 455 U.S., at 753. And the risk of error, Mississippi's experience shows, is considerable. See n.3. [FN3. On the efficacy of appellate review in parental status termination cases, M.L.B. notes that of the eight reported appellate challenges to Mississippi trial court termination orders from 1980 through May 1996, three were reversed by the Mississippi
The countervailing government interest, as in *Mayer*, is financial. Mississippi urges, as the justification for its appeal cost prepayment requirement, the State's legitimate interest in offsetting the costs of its court system. Brief for Respondents 4, 8, n.1, 27-30. But in the tightly circumscribed category of parental status termination cases, appeals are few, and not likely to impose an undue burden on the State. See Brief for Petitioner 20, 25 (observing that only 16 reported appeals in Mississippi from 1980 until 1996 referred to the State's termination statute, and only 12 of those decisions addressed the merits of the grant or denial of parental rights); cf. Brief for Respondents 28 (of 63,765 civil actions filed in Mississippi Chancery Courts in 1995, 194 involved termination of parental rights; of cases decided on appeal in Mississippi in 1995 (including Court of Appeals and Supreme Court cases), 492 were first appeals of criminal convictions, 67 involved domestic relations, 16 involved child custody). Mississippi's experience with criminal appeals is noteworthy in this regard. In 1995, the Mississippi Court of Appeals disposed of 298 first appeals from criminal convictions, Sup. Ct. of Miss. Ann. Rep. 42 (1995); of those appeals, only seven were appeals from misdemeanor convictions, ibid., notwithstanding our holding in *Mayer* requiring *in forma pauperis* transcript access in petty offense prosecutions. [FN 13: Many States provide for *in forma pauperis* appeals, including transcripts, in civil cases generally. [16 states listed] Several States deal discretely with *in forma pauperis* appeals, including transcripts, in parental status termination cases. [10 states listed]]

Justice KENNEDY, concurring in the judgment.

The Court gives a most careful and comprehensive recitation of the precedents from *Griffin v. Illinois*, 351 U.S. 12 (1956), through *Mayer v. Chicago*, 404 U.S. 189 (1971), and beyond, a line of decisions which invokes both equal protection and due process principles. The duality, as the Court notes, stems from *Griffin* itself, which produced no opinion for the Court and invoked strands of both constitutional doctrines.

In my view the cases most on point, and the ones which persuade me we must reverse the judgment now reviewed, are the decisions addressing procedures involving the rights and privileges inherent in family and personal relations. These are *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18 (1981); and *Santosky v. Kramer*, 455 U.S. 745 (1982), all cases resting exclusively upon the Due Process Clause. Here, due process is quite a sufficient basis for our holding.

I acknowledge the authorities do not hold that an appeal is required, even in a criminal case; but given the existing appellate structure in Mississippi, the realities of the litigation process, and the fundamental interests at stake in this particular proceeding, the State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means. The Court well describes the
fundamental interests the petitioner has in ensuring that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). With these observations, I concur in the judgment.

Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE joins except as to Part II, dissenting.

Today the majority holds that the Fourteenth Amendment requires Mississippi to afford petitioner a free transcript because her civil case involves a “fundamental” right. The majority seeks to limit the reach of its holding to the type of case we confront here, one involving the termination of parental rights. I do not think, however, that the new-found constitutional right to free transcripts in civil appeals can be effectively restricted to this case. The inevitable consequence will be greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished from the admittedly important interest at issue here. The cases on which the majority relies, primarily cases requiring appellate assistance for indigent criminal defendants, were questionable when decided, and have, in my view, been undermined since. Even accepting those cases, however, I am of the view that the majority takes them too far. I therefore dissent.

A number of cases discussed by the Court in M.L.B. were decided before 1976, when the Court was focused more on two levels of scrutiny – strict scrutiny and minimum rationality review – rather than the extra levels of scrutiny applied today – intermediate review, such as in gender discrimination, discuss in Chapter 22, or illegitimacy discrimination cases, addressed at § 23.3; “third-order” reasonableness balancing with the burden on the state to justify the reasonableness of the action, as in facial discrimination cases under the Dormant Commerce Clause under Maine v. Taylor, addressed at § 13.3.3, or individuals singled out for regulatory treatment in Dolan v. Tigard under the Takings Clause, addressed at § 18.3.4; or “second-order” reasonableness balancing, as discussed in Chapters 24-26 on less than substantial burdens on unenumerated rights, including right to vote (§§ 24.1, 24.3), to marry (§ 25.4.1), raise children (§ 25.4.3), and access to abortion (§ 26.4).

These earlier cases are nevertheless consistent in their results with the doctrine that “substantial” burdens on the right of access to courts, which occur more often in the context of criminal proceedings or civil proceedings involving a fundamental right, trigger strict scrutiny. “Less than substantial” burdens on the right to access to courts trigger only “second-order” reasonableness review, and thus are usually upheld. In 1996, the Court made this clearer in Lewis v. Casey, a case involving complaints by prisoners that the prison law library was not adequately maintained. Indicating the minimal injury suffered by the prisoners, the Court noted that the proper standard of review was whether the prison practice was “reasonably related to legitimate penological interests,” citing Turner v. Safley, discussed at § 25.4.1 n.21, which involves “second-order” reasonableness balancing, not minimum rationality review.

2. Right to Travel: Equal Protection and Privileges or Immunities Clauses

Saenz v. Roe
526 U.S. 489 (1999)

Justice STEVENS delivered the opinion of the Court.

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence.

California is not only one of the largest, most populated, and most beautiful States in the Nation; it is also one of the most generous. Like all other States, California has participated in several welfare programs authorized by the Social Security Act and partially funded by the Federal Government. Its programs, however, provide a higher level of benefits and serve more needy citizens than those of most other States. In one year the most expensive of those programs, Aid to Families with Dependent Children (AFDC), which was replaced in 1996 with Temporary Assistance to Needy Families (TANF), provided benefits for an average of 2,645,814 persons per month at an annual cost to the State of $2.9 billion. In California the cash benefit for a family of two – a mother and one child – is $456 a month, but in the neighboring State of Arizona, for example, it is only $275.

In 1992, in order to make a relatively modest reduction in its vast welfare budget, the California Legislature enacted § 11450.03 of the state Welfare and Institutions Code. That section sought to change the California AFDC program by limiting new residents, for the first year they live in California, to the benefits they would have received in the State of their prior residence.

The word “travel” is not found in the text of the Constitution. Yet the “constitutional right to travel from one State to another” is firmly embedded in our jurisprudence. United States v. Guest, 383 U.S. 745, 757 (1966). Indeed, as Justice Stewart reminded us in Shapiro v. Thompson, 394 U.S. 618 (1969), the right is so important that it is “assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.” Id., at 643 (concurring opinion).

In Shapiro, we reviewed the constitutionality of three statutory provisions that denied welfare assistance to residents of Connecticut, the District of Columbia, and Pennsylvania, who had resided within those respective jurisdictions less than one year immediately preceding their applications for assistance. Without pausing to identify the specific source of the right, we began by noting that the Court had long “recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.” Id., at 629. We squarely held that it was “constitutionally impermissible” for a State to enact durational residency requirements for the purpose of inhibiting the migration by needy persons into the State. We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause “unless shown to be necessary
to promote a compelling governmental interest,” id., at 634, and that no such showing had been made.

The “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

It was the right to go from one place to another, including the right to cross state borders while en route, that was vindicated in Edwards v. California, 314 U.S. 160 (1941), which invalidated a state law that impeded the free interstate passage of the indigent. We reaffirmed that right in United States v. Guest, 383 U.S. 745 (1966), which afforded protection to the “‘right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.’” Id., at 757. Given that § 11450.03 imposed no obstacle to respondents' entry into California, we think the State is correct when it argues that the statute does not directly impair the exercise of the right to free interstate movement. For the purposes of this case, therefore, we need not identify the source of that particular right 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 758.

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the “Privileges and Immunities of Citizens in the several States” that he visits. This provision removes “from the citizens of each State the disabilities of alienage in the other States.” Paul v. Virginia, 8 Wall. 168, 180 (1868) (“[W]ithout some provision . . . removing from the citizens of each State the disabilities of alienage in the 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”).

What is at issue in this case, then, is this third aspect of the right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . .”
Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, [83 U.S. (16 Wall). 36 (1873)], it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause “is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State.” Id., at 80. Justice Bradley, in dissent, used even stronger language to make the same point: “The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.” Id., at 112-113.

That newly arrived citizens “have two political capacities, one state and one federal,” adds special force to their claim that they have the same rights as others who share their citizenship. Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro*, but it is surely no less strict.

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only “incidentally” is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. See Dunn v. Blumstein, 405 U.S. 330, 339 (1972). But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

Disavowing any desire to fence out the indigent, California has instead advanced an entirely fiscal justification for its multitiered scheme. The enforcement of § 11450.03 will save the State approximately $10.9 million a year. The question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen. An evenhanded, across-the-board reduction of about 72 cents per month for every beneficiary would produce the same result. But our negative answer to the question does not rest on the weakness of the State's purported fiscal justification. It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: “That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.” Zobel, 457 U.S., at 69. It is equally clear that the Clause does not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence. Thus § 11450.03 is doubly vulnerable: Neither the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed.
among its needy citizens. As in Shapiro, we reject any contributory rationale for the denial of benefits to new residents: “But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens.” 394 U.S., at 632-633. See also Zobel, 457 U.S., at 64. In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.

Citizens of the United States, whether rich or poor, have the right to choose to be citizens “of the State wherein they reside.” U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, “framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

Chief Justice REHNQUIST, with whom Justice THOMAS joins, dissenting.

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment – a Clause relied upon by this Court in only one other decision, Colgate v. Harvey, 296 U.S. 404 (1935), overruled five years later by Madden v. Kentucky, 309 U.S. 83 (1940). It uses this Clause to strike down what I believe is a reasonable measure falling under the head of a “good-faith residency requirement.” Because I do not think any provision of the Constitution – and surely not a provision relied upon for only the second time since its enactment 130 years ago – requires this result, I dissent.

No doubt the Court has, in the past 30 years, essentially conflated the right to travel with the right to equal state citizenship in striking down durational residence requirements similar to the one challenged here. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down 1-year residence before receiving any welfare benefit); Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down 1-year residence before receiving the right to vote in state elections); Maricopa County, 415 U.S., at 280-283 (striking down 1-year county residence before receiving entitlement to nonemergency hospitalization or emergency care). These cases marked a sharp departure from the Court's prior right-to-travel cases because in none of them was travel itself prohibited. See id., at 254-255 (“Whatever its ultimate scope . . . the right to travel was involved in only a limited sense in Shapiro”); Shapiro, supra, at 671-672 (Harlan, J., dissenting).

Instead, the Court in these cases held that restricting the provision of welfare benefits, votes, or certain medical benefits to new citizens for a limited time impermissibly “penalized” them under the Equal Protection Clause of the Fourteenth Amendment for having exercised their right to travel. See Maricopa County, supra, at 257. The Court thus settled for deciding what restrictions amounted to “deprivations of very important benefits and rights” that operated to indirectly “penalize” the right to travel. See Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 907 (1986) (plurality opinion). In other cases, the Court recognized that laws dividing new and old residents had little to do with the right to travel and merely triggered an inquiry into whether the resulting classification rationally
furthered a legitimate government purpose. See Zobel v. Williams, 457 U.S. 55, 60, n.6 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985). While Zobel and Hooper reached the wrong result in my view, they at least put the Court on the proper track in identifying exactly what interests it was protecting; namely, the right of individuals not to be subject to unjustifiable classifications as opposed to infringements on the right to travel. [FN2. As Chief Justice Burger aptly stated in Zobel: “In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents.” 457 U.S., at 60, n.6.]

[T]his Court has repeatedly sanctioned the State's use of durational residence requirements before new residents receive in-state tuition rates at state universities. Starns v. Malkerson, 401 U.S. 985 (1971), summarily aff'd 326 F.Supp. 234 (D.Minn.1970) (upholding 1-year residence requirement for in-state tuition); Sturgis v. Washington, 414 U.S. 1057, summarily aff'd 368 F.Supp. 38 (W.D.Wash.1973) (same). The Court has declared: “The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but have come there solely for educational purposes, cannot take advantage of the in-state rates.” Vlandis v. Kline, 412 U.S. 441, 453-454 (1973). The Court has done the same in upholding a 1-year residence requirement for eligibility to obtain a divorce in state courts, see Sosna v. Iowa, 419 U.S. 393, 406-409 (1975), and in upholding political party registration restrictions that amounted to a durational residency requirement for voting in primary elections, see Rosario v. Rockefeller, 410 U.S. 752, 760-762 (1973).

If States can require individuals to reside in-state for a year before exercising the right to educational benefits, the right to terminate a marriage, or the right to vote in primary elections that all other state citizens enjoy, then States may surely do the same for welfare benefits. Indeed, there is no material difference between a 1-year residence requirement applied to the level of welfare benefits given out by a State, and the same requirement applied to the level of tuition subsidies at a state university. The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people, and California's standard of living and higher education system make both subsidies quite attractive. Durational residence requirements were upheld when used to regulate the provision of higher education subsidies, and the same deference should be given in the case of welfare payments. See Dandridge v. Williams, 397 U.S. 471, 487 (1970) (“[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients”).

Prior to Saenz, the Court’s right to travel cases were guided by the 1969 case of Shapiro v. Thompson.60 There, a one-year durational residence requirement for welfare was held to penalize exercise of a fundamental right to travel and, thus, triggered strict scrutiny. The state interest in keeping out poor migrants was held illegitimate as a penalty on travel. Budgetary and administrative justifications were held not compelling, and were not necessary because less burdensome means

were available. Reflecting his Holmesian deference-to-government predisposition, Justice Harlan
dissenting, stating Shapiro was a return to the "superlegislature" days of due process review in
Lochner v. New York. Justice Harlan added, “I must reiterate that I know of nothing which entitles
this Court to pick out particular human activities, characterize them as ‘fundamental’ and give them
added protection under an unusually stringent equal protection test.”61

In subsequent cases, substantial or severe burdens on the right to travel triggered the Shapiro strict
scrutiny approach. Thus, in Memorial Hospital v. Maricopa County,62 in the course of invalidating
a durational residence requirement on state payment for non-emergency hospital service under a
state welfare program, the Court noted that the strict scrutiny of Shapiro applied only where there
had been a denial of a "basic necessity of life," or a "vital" government benefit, and that medical care
qualified as such a “vital” government benefit. In Dunn v. Blumstein,63 the Court said that there is
no need to show actual deterrence of travel; it is enough that a law penalize exercise of the right.
A one-year durational residence law on voting “completely bar[s]” exercise of the fundamental right
to vote. Even if the goal were compelling, like preventing fraud in voting, the state must choose the
least burdensome means for reaching it, and a one-year requirement is not such a means.

On the other hand, less substantial or severe burdens on the right to travel triggered some kind of
rational review analysis. In some cases, the regulations were upheld. For example, in Vlandis v. Kline,64 the Court indicated in dicta that a one-year durational residence requirement for lower
tuition at a state university would be constitutional under a rational basis test, because such a
requirement did not impose the kind of burden as found in Shapiro, which involved the immediate
and pressing need for preservation of life and health of persons unable to live without public
assistance. In Sosna v. Iowa,65 the Court held that Iowa could impose a one-year durational
residence requirement for obtaining a divorce, a requirement many states had at the time. Rehnquist
explained that this law was reasonably justified on grounds other than budget or administrative
convenience, i.e., avoiding officious intermeddling in matters in which another state (where the
parties lived when married) may have a greater interest, and protecting judgments from collateral

61 Id. at 662 (Harlan, J., dissenting), citing Lochner v. New York, 198 U.S. 45 (1905).

62 415 U.S. 250, 253-70 (1974). Justice Rehnquist, dissenting, said that the right to travel was
only remotely affected by the state’s durational residence requirement for non-emergency hospital
service, and this was not an "urgent need" for the necessities of life or a benefit funded from current
revenues to which the claimant may have contributed. Id. at 283-88 (Rehnquist, J., dissenting).

63 405 U.S. 330, 336, 351-54 (1972); id. at 363-64 (Burger, C.J., dissenting) (one-year
residency rule, like being required to wait until 18 to vote, should be valid; strict scrutiny should not
apply). Justice Powell and Rehnquist took no part in the consideration or decision of the case.

64 412 U.S. 441, 452 n.9 (1973), citing, Starns v. Malkerson, 326 F.Supp. 234 (D. Minn.1970),
aff’d summarily, 401 U.S. 985 (1971).

65 419 U.S. 393, 404-10 (1975); id. at 418 (Brennan, J., joined by Marshall, J., dissenting).
attack. He said that unlike the situation in Shapiro, Dunn, and Memorial, the plaintiff was not "irretrievably foreclosed" from obtaining some part of what she sought. In Jones v. Helms, the Court allowed a state to transform the misdemeanor of parental abandonment into a felony if the parent left the state. Justice Stevens explained that the criminal conduct engaged in by the individual in the first state "necessarily qualified" the right to travel to another state. He also noted the case did not involve disparate treatment of residents and non-residents or new and old residents.

In other cases, however, the Court found the state action unconstitutional under some form of rational basis review. For example, in Williams v. Vermont, the Court invalidated the failure by Vermont in a "vehicle purchase and use tax" to give a credit for sales tax paid in another state on the purchase of a car by a person who, at that time, was not a resident of Vermont. Such a credit was given if the buyer was a resident of Vermont at the time of purchase. The Court said that residence at the time of purchase bears no rational relation to the purpose of the tax, i.e., to improve and maintain Vermont highways. In Zobel v. Williams, the Court said that distinctions between new and old residents in payments from Alaska's mineral fund violated the Equal Protection Clause, as it was not rational to give pre-enactment residents more cash to create incentives for living in Alaska or to encourage more prudent management of the fund. Further, a purpose to reward citizens for past contributions is not legitimate because it could open the door to apportioning other rights according to length of residence. In Hooper v. Bernalillo, the Court struck down a tax exemption for veterans who resided in the state before May 8, 1976. Applying rational basis scrutiny, the Court held that it was illegitimate for laws to create permanent distinctions among residents based on the length or timing of their residence in the state.

In Attorney General of New York v. Soto-Lopez, the Court split on whether strict scrutiny should be applied or only rational basis review. The law in Soto-Lopez involved a civil service preference for resident veterans who lived in the state when they entered military service. Justice Brennan, with


67 472 U.S. 14, 21-28 (1985); id. at 28-37 (Blackmun, J., joined by Rehnquist & O’Connor, JJ., dissenting) (legislators could presume that most people who reside in Vermont and who buy cars elsewhere will return immediately and, thus, will not have used their cars in two states).

68 457 U.S. 55, 60-65 (1982); id. at 65-68 (Brennan, J., joined by Marshall, Blackmun & Powell, JJ., concurring); id. at 76-81 (O’Connor, J., concurring in the judgment); id. at 81-84 (Rehnquist, J., dissenting) (illegitimacy of recognizing past contributions was established only in a few cases on the right to travel. Here, however, no travel was impeded).


70 476 U.S. 898, 901-12 (1986) (plurality opinion of Brennan, J., joined by Marshall, Blackmun & Powell, JJ.); id. at 912-16 (Burger, C.J., concurring in the judgment); id. at 916 (White, J., concurring in the judgment); id. at 918-25 (O’Connor, J., joined by Rehnquist & Stevens, JJ., dissenting).
Justices Marshall, Blackmun, and Powell, said that because the law penalized those persons who had exercised their right to migrate, strict scrutiny should be used. Justice Brennan indicated that “even temporary deprivations of very important benefits and rights can operate to penalize migration.” Once strict scrutiny was triggered, it was easy for Justice Brennan to conclude that none of the interests advanced by New York could satisfy strict scrutiny review. Chief Justice Burger and Justice White, in separate concurrences, found that the law failed even rational basis, as in *Zobel* and *Hooper*. Justice O’Connor, dissenting with Justices Rehnquist and Stevens, said that more than a minimal effect on the right to travel or migrate should be required to trigger heightened scrutiny.

As in the earlier cases, the Court did not make clear in *Soto-Lopez* whether the rational basis review was simply minimal rationality review, which for the concurring Justices the legislation failed to meet, or a kind of “second-order” reasonableness balancing. To the extent there is a fundamental right to travel implicated, it should be a reasonableness balancing. This conclusion is supported by the results in cases like *Soto-Lopez*, *Zobel*, and *Hooper*, as well as Chief Justice Rehnquist’s dissent in *Saenz* analogizing these cases to *Rosario v. Rockefeller*, which, as noted at § 24.3 n.14, applied an “onerous burden” standard in a right to vote case, consistent with “second-order” reasonableness balancing, as discussed at § 24.3 nn.14-20. On the other hand, formalist and Holmesian Justices would no doubt wish to characterize the review in these cases as minimum rationality review.

*Saenz* departed from this *Shapiro* line of analysis, and seemed to adopt a categorical rule that any burden, whether substantial or not, on what the Court called the “third” aspect of the right to travel would trigger under the 14th Amendment Privileges or Immunities Clause at a minimum strict scrutiny, and perhaps, an absolute categorical bar. The scope of the *Saenz* theory remains unclear. While stricter than the *Shapiro* line of cases in that any burden triggers heightened scrutiny, grounding this aspect of the right to travel cases under the Privileges or Immunities Clause means it only applies to “citizens,” not any “person,” including resident aliens.

§ 27.4 Non-Fundamental Rights Cases

Under the sequence of fundamental right cases, it is the Court, under whatever theory the majority adopts, that determines what rights are “implicit in concept of ordered liberty” because they are “deeply rooted in our Nation’s history and traditions” or “fundamental to our concept of constitutionally ordered liberty.” As has been noted, under this approach “the choice of fundamental values, unsurprisingly, [favors] the values of the upper-middle professional class,” the group from whom judges tend to be drawn. . . . [T]he list of values the Court [has] tended to enshrine as fundamental [includes] expression, association, . . . academic freedom, the privacy of the home, and personal autonomy. . . . But watch [what happens] when someone mentions jobs, food or housing; those are important, sure, but they aren’t fundamental.”

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In 1973, in *San Antonio Independent School District v. Rodriguez*, a 5-4 Court held there is no fundamental right to equal funding in education under the United States Constitution. School children who are poor and reside in school districts having a low property tax base are not a suspect or quasi-suspect class. Thus, minimum rationality review was used to test the unequal distribution of tax moneys among Texas school districts. The test was passed because Texas made reasonable efforts to ameliorate differences between rich and poor districts, there was a lack of purposeful discrimination, the Texas finance system had resulted from studies by qualified people, the plan fostered local control of schools by use of local financing, and similar plans existed in most states.

Liberal Holmesian Justice White, dissenting with liberal instrumentalist Justices Douglas and Brennan, said that the Texas system was not rationally related to its end of maximizing local initiative and local choice because there was no chance to achieve those goals in districts with property taxes so low that there was little opportunity for parents to augment school district revenues. Liberal instrumentalist Justice Marshall, dissenting with Justice Douglas, urged the Court to consider the importance to individuals of the benefits not received. In his view, the discrimination on the basis of group wealth called for heightened scrutiny because education is such an important interest, citing *Brown v. Board of Education*. Justice Brennan, dissenting, emphasized that education is linked to participation in the electoral process and to rights of free speech and association. Thus, any classification affecting education must be given strict scrutiny.

Despite *Rodriguez*, a number of state courts, particularly in large population states where disparities in funding tend to be greater, have found a fundamental right to education under their own state Constitutions, and thus applied their own form of rigorous scrutiny to equal funding of public schools. These cases have served to moderate, somewhat, unequal funding in rich versus poor school districts. The Court also noted in *Papasan v. Allain* that *Rodriguez* had "not yet definitively settled . . . whether a minimally adequate education is a fundamental right." Given the level of funding by state and local governments, there will likely be few examples where denial of access to constitutionally minimally adequate education could be raised.

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72 411 U.S. 1, 17-44 (1973).

73 *Id.* at 62-63 (Brennan, J., dissenting); *id.* at 63-70 (White, J., joined by Douglas & Brennan, JJ., dissenting); *id.* at 70-72 (Marshall, J., joined by Douglas, J., dissenting).


CHAPTER 28: PROCEDURAL DUE PROCESS

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§ 28.1 What Counts as a Deprivation of Due Process

Even if the government can regulate an individual, and thus no other individual rights challenge is successful under any of the doctrines addressed in Chapters 15-27, the government still must satisfy a procedural due process analysis. The Due Process Clauses of the Fifth and 14th Amendments provide that no federal or state action may “deprive a person of life, liberty or property, without due process of law.” Based on this text, three main questions arise in procedural due process cases. The first question is whether a “deprivation” has occurred as the result of state or federal action, addressed at § 28.1. The second question is who counts as a “person” and what “life,” “liberty,” or “property” rights are protected under “due process,” addressed at § 28.2. The third question is what “due process of law” requires before the deprivation can be constitutional, addressed at § 28.3.

Although there has been some wavering with respect to what constitutes a “deprivation” under the Due Process Clause, the standard doctrine is that a deprivation is a loss caused by “state action,” addressed in Chapter 15, that is intentional,1 or the product of deliberate indifference that shocks the conscience,2 but not merely negligent.3 It is the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, that inflicts the injury for which the government can be made responsible.4 There is no deprivation, and thus no need for due process, if an adverse impact on a liberty or property interest is merely an indirect result of action the government is otherwise entitled to make.5


2 County of Sacramento v. Lewis, 523 U.S. 833, 848-50 (1998) (“deliberate indifference” that “shocks the conscience” can trigger a procedural due process claim, the Court leaving open the question whether “recklessness” or “gross negligence,” which presumably are lower standards of culpability than deliberate indifference, could ever satisfy a “shock the conscience” requirement).


In 1981, towards the end of the instrumentalist era, the Court held in *Parratt v. Taylor*\(^6\) that a loss of property, negligently caused by a state official, was a deprivation within the Due Process Clause, but that the state's post-deprivation tort remedy provided all the process that was due. Five years later, in 1986, at the very end of instrumentalist era, the Court held in *Daniels v. Williams*, excerpted below, that the word "deprive" in the Due Process Clause connotes more than a mere negligent act and overruled *Parratt* to the extent that it said a lack of due care by a state official may "deprive" an individual of life, liberty, or property under the 14th Amendment.

**Daniels v. Williams**  
474 U.S. 327 (1986)

Justice REHNQUIST delivered the opinion of the Court.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), a state prisoner sued under 42 U.S.C. § 1983, claiming that prison officials had negligently deprived him of his property without due process of law. After deciding that § 1983 contains no independent state-of-mind requirement, we concluded that although petitioner had been “deprived” of property within the meaning of the Due Process Clause of the Fourteenth Amendment, the State's postdeprivation tort remedy provided the process that was due. Petitioner's claim in this case, which also rests on an alleged Fourteenth Amendment “deprivation” caused by the negligent conduct of a prison official, leads us to reconsider our statement in *Parratt* that “the alleged loss, even though negligently caused, amounted to a deprivation.” Id., at 536-537. We conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.

In this § 1983 action, petitioner seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. He claims that, while an inmate at the city jail in Richmond, Virginia, he slipped on a pillow negligently left on the stairs by respondent, a correctional deputy stationed at the jail. Respondent's negligence, the argument runs, “deprived” petitioner of his “liberty” interest in freedom from bodily injury, see *Ingraham v. Wright*, 430 U.S. 651 711 (1977); because respondent maintains that he is entitled to the defense of sovereign immunity in a state tort suit, petitioner is without an “adequate” state remedy, cf. *Hudson v. Palmer*, 468 U.S. 517, 534-536 (1984). Accordingly, the deprivation of liberty was without “due process of law.”

Because of the inconsistent approaches taken by lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort, see *Jackson v. Joliet*, 465 U.S. 1049, 1050 (1984) (White, J., dissenting from denial of certiorari) (collecting cases), and the apparent lack of adequate guidance from this Court, we granted certiorari. 469 U.S. 1207 (1985).

In *Parratt*, before concluding that Nebraska's tort remedy provided all the process that was due, we said that the loss of the prisoner's hobby kit, “even though negligently caused, amounted to a

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deprivation [under the Due Process Clause].” 451 U.S., at 536-537. Justice Powell, concurring in the result, criticized the majority for “pass[ing] over” this important question of the state of mind required to constitute a “deprivation” of property. Id., at 547. He argued that negligent acts by state officials, though causing loss of property, are not actionable under the Due Process Clause. To Justice Powell, mere negligence could not “wor[k] a deprivation in the constitutional sense.” Id., at 548 (emphasis in original). Not only does the word “deprive” in the Due Process Clause connote more than a negligent act, but we should not “open the federal courts to lawsuits where there has been no affirmative abuse of power.” Id., at 548-549; see also id., at 545 (Stewart, J., concurring) (“To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution”). Upon reflection, we agree and overrule Parratt to the extent that it states that mere lack of due care by a state official may “deprive” an individual of life, liberty, or property under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. E.g., Davidson v. New Orleans, 96 U.S. 97 (1878) (assessment of real estate); Rochin v. California, 342 U.S. 165 (1952) (stomach pumping); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Ingraham v. Wright, 430 U.S. 651 (1977) (paddling student); Hudson v. Palmer, 468 U.S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before Parratt supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was “‘intended to secure the individual from the arbitrary exercise of the powers of government,’” Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. (17 U.S.) 235, 244 (1819)). See also Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123 (1889)”; Parratt, supra, 541 U.S., at 549 (Powell, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to “deprive any person of life, liberty, or property,” the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, supra, it serves to prevent governmental power from being “used for purposes of oppression,” Murray's Les v. Hoboken Land & Improvement Co., 18 How. (59 U.S.) 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment).

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.
“Medical malpractice does not become a constitutional violation merely because the victim is a prisoner,” Estelle v. Gamble, 429 U.S. 97, 106 (1976), and “false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.” Baker v. McCollan, 443 U.S. 137, 146 (1979). Where a government official's act causing injury to life, liberty, or property is merely negligent, “no procedure for compensation is constitutionally required.” Parratt, supra, 451 U.S., at 548 (Powell, J., concurring in result) (emphasis added). [FN1: Accordingly, we need not decide whether . . . a sovereign immunity defense in a Virginia tort suit would render that remedy “inadequate” under Parratt and Hudson v. Palmer, 468 U.S. 517 (1984).]

That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

Jailers may owe a special duty of care to those in their custody under state tort law, see Restatement (Second) of Torts § 314A(4) (1965), but for the reasons previously stated we reject the contention that the Due Process Clause of the Fourteenth Amendment embraces such a tort law concept. Petitioner alleges that he was injured by the negligence of respondent, a custodial official at the city jail. Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment to the United States Constitution does not afford him a remedy.

Justice MARSHALL concurs in the result.

Justice BLACKMUN, concurring in the judgment.


Justice STEVENS concurred in the judgment and filed opinion [in Davidson also applicable here]]

Davidson v. Cannon
474 U.S. 344 (1986)

Justice REHNQUIST delivered the opinion of the Court.

Petitioner sued prison officials seeking damages under 42 U.S.C. § 1983 for injuries he suffered when they negligently failed to protect him from another inmate. On December 19, 1980, petitioner was threatened by one McMillian, a fellow inmate at the New Jersey State Prison at Leesburg. Petitioner sent a note reporting the incident that found its way to respondent Cannon, the Assistant Superintendent of the prison, who read the note and sent it on to respondent James, a Corrections Sergeant. Cannon subsequently testified that he did not view the situation as urgent because on previous occasions when petitioner had a serious problem he had contacted Cannon directly.
James received the note at about 2 p.m. on December 19, and was informed of its contents. James then attended to other matters, which he described as emergencies, and left the note on his desk unread. By the time he left the prison that evening James had forgotten about the note, and since neither he nor Cannon worked on December 20 or 21, the officers on duty at that time had not been informed of the threat. Petitioner took no steps other than writing the note to alert the authorities that he feared an attack, nor did he request protective custody. He testified that he did not foresee an attack, and that he wrote the note to exonerate himself in the event that McMillian started another fight. He also testified that he wanted officials to reprimand McMillian in order to forestall any future incident. On Sunday, December 21, McMillian attacked petitioner with a fork, breaking his nose and inflicting other wounds to his face, neck, head, and body.

In Daniels, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required. In this case, petitioner does not challenge the District Court's finding that respondents “did not act with deliberate or callous indifference to [petitioner's] needs,” 752 F.2d, at 820. Instead, he claims only that respondents “negligently failed to protect him from another inmate.” Brief for Petitioner 2. Daniels therefore controls.

Justice STEVENS, concurring in the judgments [in Daniels and Davidson].

I would not reject these claims, as the Court does, by attempting to fashion a new definition of the term “deprivation” and excluding negligence from its scope. No serious question has been raised about the presence of “state action” in the allegations of negligence, and the interest in freedom from bodily harm surely qualifies as an interest in “liberty.” Thus, the only question is whether negligence by state actors can result in a deprivation. “Deprivation,” it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss. The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing – being “deprived” of – an aspect of liberty as the result, in part, of a form of state action.

Thus, I would characterize each loss as a “deprivation” of liberty. Because the cases raise only procedural due process claims, however, it is also necessary to examine the nature of petitioners' challenges to the state procedures. To prevail, petitioners must demonstrate that the state procedures for redressing injuries of this kind are constitutionally inadequate. Petitioners must show that they contain a defect so serious that we can characterize the procedures as fundamentally unfair, a defect so basic that we are forced to conclude that the deprivation occurred without due process.

Daniels' claim is essentially the same as the claim we rejected in Parratt. The Court of Appeals for the Fourth Circuit determined that Daniels had a remedy for the claimed negligence under Virginia law. Although Daniels vigorously argues that sovereign immunity would have defeated his claim, the Fourth Circuit found to the contrary, and it is our settled practice to defer to the Courts of Appeals on questions of state law. It is true that Parratt involved an injury to “property” and that
Daniels' case involves an injury to “liberty,” but, in both cases, the plaintiff claimed nothing more than a “procedural due process” violation. In both cases, a predeprivation hearing was definitionally impossible. And, in both cases, the plaintiff had state remedies that permitted recovery if state negligence was established. Thus, a straightforward application of *Parratt* defeats Daniels' claim.

Davidson's claim raises a question not specifically addressed in *Parratt*. According to the Third Circuit, no state remedy was available because a New Jersey statute prohibits prisoner recovery from state employees for injuries inflicted by other prisoners. Thus, *Davidson* puts the question whether a state policy of noncompensability for certain types of harm, in which state action may play a role, renders a state procedure constitutionally defective. In my judgment, a state policy that defeats recovery does not, in itself, carry that consequence. Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, in my judgment, the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate. There is no reason to believe that the Due Process Clause of the Fourteenth Amendment and the legislation enacted pursuant to § 5 of that Amendment should be construed to suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair.

Justice BRENNAN, dissenting.

I agree with the Court that merely negligent conduct by a state official, even though causing personal injury, does not constitute a deprivation of liberty under the Due Process Clause. I do believe, however, that official conduct which causes personal injury due to recklessness or deliberate indifference, does deprive the victim of liberty within the meaning of the Fourteenth Amendment.

As Justice Blackmun persuasively demonstrates in his dissent, the record in this case strongly suggests that the prison officials' failure to protect petitioner from attack was reckless and not merely negligent. Accordingly, like Justice Blackmun, I would vacate the judgment and remand this case so that the Court of Appeals may review the District Court's holding that respondents' conduct was not reckless.

Justice BLACKMUN, with whom Justice MARSHALL joins, dissenting.

When the State of New Jersey put Robert Davidson in its prison, it stripped him of all means of self-protection. It forbade his access to a weapon. N.J. Dept. of Corrections Standards 251.4.a.201 and .202. It forbade his fighting back. Standards 251.4.a.002, .003, and .004. It blocked all avenues of escape. The State forced Davidson to rely solely on its own agents for protection. When threatened with violence by a fellow inmate, Davidson turned to the prison officials for protection, but they ignored his plea for help. As a result, Davidson was assaulted by another inmate. He suffered stab wounds on his face and body as well as a broken nose that required surgery.
The Court nevertheless excuses the prison officials from liability under 42 U.S.C. § 1983, holding that because the officials were “merely negligent in causing the injury” there was no “deprivation” of liberty without due process of law. It relies for this proposition and result on the easier companion case, Daniels v. Williams, 474 U.S. 327 (1986), which overrules in part Parratt v. Taylor, 451 U.S. 527 (1981). In Daniels, also a § 1983 suit, the Court holds that a pretrial detainee, allegedly injured when he slipped on a pillow negligently left on the jail stairs by a deputy, as a matter of law suffered no deprivation under the Fourteenth Amendment.

While I concur in the judgment in Daniels, I do not join the Court in extending that result to this case. It is one thing to hold that a commonplace slip and fall, or the loss of a $23.50 hobby kit, see Parratt v. Taylor, supra, does not rise to the dignified level of a constitutional violation. It is a somewhat different thing to say that negligence that permits anticipated inmate violence resulting in injury, or perhaps leads to the execution of the wrong prisoner, does not implicate the Constitution's guarantee of due process. When the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall. But the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed. In these circumstances, I feel that Davidson was deprived of liberty by the negligence of the prison officials. Moreover, the acts of the state officials in this case may well have risen to the level of recklessness. I therefore dissent.

Consistent with Daniels and Davidson, a state’s failure to protect an individual not under state custody or supervision against private violence does not constitute a violation of due process. Thus, the Court held in DeShaney v. Winnebago County Department of Social Services that there was no due process case against social workers and other local officials who received believable complaints that a child was being beaten by his father, but did not act to remove the child from father's custody.

DeShaney v. Winnebago County Department of Social Services
489 U.S. 189 (1989)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

The facts of this case are undeniably tragic. Petitioner Joshua DeShaney was born in 1979. In 1980, a Wyoming court granted his parents a divorce and awarded custody of Joshua to his father, Randy DeShaney. The father shortly thereafter moved to Neenah, a city located in Winnebago County, Wisconsin, taking the infant Joshua with him. There he entered into a second marriage, which also ended in divorce.
The Winnebago County authorities first learned that Joshua DeShaney might be a victim of child abuse in January 1982, when his father's second wife complained to the police, at the time of their divorce, that he had previously “hit the boy causing marks and [was] a prime case for child abuse.” App. 152-153. The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the accusations, and DSS did not pursue them further. In January 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions. The examining physician suspected child abuse and notified DSS, which immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. Three days later, the county convened an ad hoc “Child Protection Team” – consisting of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel – to consider Joshua's situation. At this meeting, the Team decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court. The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counseling services, and encouraging his father's girlfriend to move out of the home. Randy DeShaney entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals.

Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father. A month later, emergency room personnel called the DSS caseworker handling Joshua's case to report that he had once again been treated for suspicious injuries. The caseworker concluded that there was no basis for action. For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head; she also noticed that he had not been enrolled in school, and that the girlfriend had not moved out. The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that they believed to be caused by child abuse. On the caseworker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still DSS took no action.

In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse.

[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. See, e.g., Harris v. McRae, 448 U.S. 297, 317-318 (1980) (no obligation to fund abortions or other medical services) (discussing Due Process Clause of Fifth Amendment); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing) (discussing Due Process Clause of Fourteenth Amendment); see also Youngberg v. Romeo, supra, 457 U.S., at 317 (“As a general matter, a State is under no constitutional duty to provide substantive services for those within its border”). As we said in Harris
v. McRae: “Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . ., it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.” 448 U.S., at 317-318 (emphasis added). If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of certain “special relationships” created or assumed by the State with respect to particular individuals. Brief for Petitioners 13-18. Petitioners argue that such a “special relationship” existed here because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Id., at 18-20. Having actually undertaken to protect Joshua from this danger – which petitioners concede the State played no part in creating – the State acquired an affirmative “duty,” enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so “shocks the conscience,” Rochin v. California, 342 U.S. 165, 172 (1952), as to constitute a substantive due process violation. Brief for Petitioners 20.

We reject this argument. It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. In Estelle v. Gamble, 429 U.S. 97 (1976), we recognized that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, Robinson v. California, 370 U.S. 660 (1962), requires the State to provide adequate medical care to incarcerated prisoners. 429 U.S., at 103-104. We reasoned that because the prisoner is unable “by reason of the deprivation of his liberty [to] care for himself,” it is only “just” that the State be required to care for him. Ibid., quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926).

In Youngberg v. Romeo, 457 U.S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting, holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their “reasonable safety” from themselves and others. Id., at 314-325; see id., at 315, 324 (dicta indicating that the State is also obligated to provide such individuals with “adequate food, shelter, clothing, and medical care”). As we explained: “If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed – who may not be punished at all – in unsafe conditions.” Id., at 315-316; see also Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police).
But these cases afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See Youngberg v. Romeo, supra, 457 U.S., at 317 (“When a person is institutionalized – and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist”). The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See Estelle v. Gamble, supra, 429 U.S., at 103-104; Youngberg v. Romeo, supra, 457 U.S., at 315-316. [FN 7: Even in this situation, we have recognized that the State “has considerable discretion in determining the nature and scope of its responsibilities.” Youngberg v. Romeo, 457 U.S., at 317.] The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See Estelle v. Gamble, supra, 429 U.S., at 103 (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met”). In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means. [FN 8: Of course, the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement. See, e.g., Whitley v. Albers, supra, 475 U.S., at 326-327 (shooting inmate); Youngberg v. Romeo, supra, 457 U.S., at 316 (shackling involuntarily committed mental patient); Hughes v. Rowe, 449 U.S. 5, 11 (1980) (removing inmate from general prison population and confining him to administrative segregation); Vitek v. Jones, 445 U.S. 480, 491-494 (1980) (transferring inmate to mental health facility).]

The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. [FN9: Complaint ¶ 16, App. 6 (“At relevant times to and until March 8, 1984, [the date of the final beating.] Joshua DeShaney was in the custody and control of Defendant Randy DeShaney”). Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy to Estelle and Youngberg, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. See Doe v. New York City Dept. of Social Services, 649 F.2d 134, 141-142 (CA2 1981), after remand, 709 F.2d 782, cert. denied sub nom. Catholic Home Bureau v. Doe, 464 U.S. 864 (1983); Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791, 794, 797 (CA11 1987) (en banc), cert. pending Ledbetter v. Taylor, No. 87-521. We express no view on the validity of this analogy, however, as
it is not before us in the present case.] While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

“The most that can be said of the state functionaries in this case,” the Court today concludes, “is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.” Ante, at 1007. Because I believe that this description of respondents' conduct tells only part of the story and that, accordingly, the Constitution itself “dictated a more active role” for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney.

It may well be, as the Court decides, that the Due Process Clause as construed by our prior cases creates no general right to basic governmental services. That, however, is not the question presented here; indeed, that question was not raised in the complaint, urged on appeal, presented in the petition for certiorari, or addressed in the briefs on the merits. No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties. This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications. In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case.

I would focus first on the action that Wisconsin has taken with respect to Joshua and children like him, rather than on the actions that the State failed to take. Such a method is not new to this Court. Both Estelle v. Gamble, 429 U.S. 97 (1976), and Youngberg v. Romeo, 457 U.S. 307 (1982), began by emphasizing that the States had confined J.W. Gamble to prison and Nicholas Romeo to a psychiatric hospital. This initial action rendered these people helpless to help themselves or to seek help from persons unconnected to the government. See Estelle, supra, 429 U.S. at 104 (“[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself”); Youngberg, supra, 457 U.S. at 317 (“When a person is institutionalized – and wholly dependent on the State – it is conceded by petitioners that a duty to provide certain services and care does exist”). Cases from the lower courts also recognize that a State's actions can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant. See, e.g., White v. Rochford, 592 F.2d 381 (CA7 1979) (police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night).
Thus, I would read *Youngberg* and *Estelle* to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.

Wisconsin has established a child-welfare system specifically designed to help children like Joshua. Wisconsin law places upon the local departments of social services such as respondent (DSS or Department) a duty to investigate reported instances of child abuse. See Wis.Stat. § 48.981(3) (1987-1988). While other governmental bodies and private persons are largely responsible for the reporting of possible cases of child abuse, see § 48.981(2), Wisconsin law channels all such reports to the local departments of social services for evaluation and, if necessary, further action. § 48.981(3). Even when it is the sheriff’s office or police department that receives a report of suspected child abuse, that report is referred to local social services departments for action, see § 48.981(3)(a); the only exception to this occurs when the reporter fears for the child's *immediate* safety. § 48.981(3)(b). In this way, Wisconsin law invites – indeed, directs – citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.

The specific facts before us bear out this view of Wisconsin's system of protecting children. Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action.

Even more telling than these examples is the Department's control over the decision whether to take steps to protect a particular child from suspected abuse. While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision (subject to the approval of the local government's Corporation Counsel) whether to disturb the family's current arrangements. App. 41, 58. When Joshua first appeared at a local hospital with injuries signaling physical abuse, for example, it was DSS that made the decision to take him into temporary custody for the purpose of studying his situation – and it was DSS, acting in conjunction with the corporation counsel, that returned him to his father. *Ante*, at 1001. Unfortunately for Joshua DeShaney, the buck effectively stopped with the Department.

In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.

It simply belies reality, therefore, to contend that the State “stood by and did nothing” with respect to Joshua. *Ante*, at 1007. Through its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua
was in grave danger. These circumstances, in my view, plant this case solidly within the tradition of cases like *Youngberg* and *Estelle*.

I would allow Joshua and his mother the opportunity to show that respondents' failure to help him arose, not out of the sound exercise of professional judgment that we recognized in *Youngberg* as sufficient to preclude liability, see 457 U.S., at 322-323, but from the kind of arbitrariness that we have in the past condemned. See, e.g., Daniels v. Williams, 474 U.S. 327, 331 (1986) (purpose of Due Process Clause was “to secure the individual from the arbitrary exercise of the powers of government” (citations omitted)); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (to sustain state action, the Court need only decide that it is not “arbitrary or capricious”); Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926) (state action invalid where it “passes the bounds of reason and assumes the character of a merely arbitrary fiat,” quoting Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204 (1912).

*Youngberg*’s deference to a decisionmaker's professional judgment ensures that once a caseworker has decided, on the basis of her professional training and experience, that one course of protection is preferable for a given child, or even that no special protection is required, she will not be found liable for the harm that follows. (In this way, *Youngberg*’s vision of substantive due process serves a purpose similar to that served by adherence to procedural norms, namely, requiring that a state actor stop and think before she acts in a way that may lead to a loss of liberty.) Moreover, that the Due Process Clause is not violated by merely negligent conduct, see Daniels, supra, and Davidson v. Cannon, 474 U.S. 344 (1986), means that a social worker who simply makes a mistake of judgment under what are admittedly complex and difficult conditions will not find herself liable in damages under § 1983.

As the Court today reminds us, “the Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’” *Ante*, at 1003, quoting Davidson, supra, at 348. My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent.

Justice BLACKMUN, dissenting.

Today, the Court purports to be the dispassionate oracle of the law, unmoved by “natural sympathy.” *Ante*, at 1007. But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. As Justice Brennan demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney – intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed.
Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, ante, at 1001, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles – so full of late of patriotic fervor and proud proclamations about “liberty and justice for all” – that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve – but now are denied by this Court – the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.

The Court did acknowledge in DeShaney that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being” and that, where the state itself created the dangerous situation, such as placing the child in foster care, “several Courts of Appeals have held . . . that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents.” Even where such a claim may be brought, a number of courts have said only showing “deliberate indifference,” not negligence, will suffice to trigger liability.7 Where only negligence need be shown, the level of protection provided in custody or in foster care cases is spotty at best.8 Even if liability is established, qualified immunity doctrine may insulate the state actor from a damage action, as discussed at § 10.4.3(A).

The Court did note in Deshaney that by voluntarily undertaking to protect the child against a danger it played no part in creating, the state may have acquired a duty under state tort law to provide him

7 See, e.g., AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 636 (9th Cir. 2012) (in a case involving sexual abuse of one foster brother by another foster brother, “plaintiffs must establish that the local government had a deliberate policy, custom, or practice [of indifference] that was the moving force behind the constitutional violation [they] suffered.”); Taylor By and Through Walker v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987) (“only where it is alleged and the proof shows that the state officials were deliberately indifferent to the welfare of the child will liability be imposed.”). See generally Carolina D. Watts, Note, "Indifferent [Towards] Indifference:" Post-DeShaney Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch, 30 Pepp. L. Rev. 125 (2002).

with adequate protection against that danger. In any event, a state could create such a system by changing state tort law. The Court concluded, however, that a state “should not have it thrust upon them by this Court’s expansion of the Due Process Clause.” A state could also provide for redress under tort negligence principles, but such cases rarely can be brought because state sovereign immunity doctrines often insulate state officials from suit. Suits against foster parents directly for mistreatment under 42 U.S.C. § 1983 usually fail as foster parents are not state actors. Even more spotty are rights recognized for state-created dangers outside the custody or foster care context.

Suits against federal prison officials for personal injuries stand a greater chance of success because the federal government was held in United States v. Muniz to have waived sovereign immunity for such acts under the Federal Tort Claims Act. In contrast, for claims involving property deprivations, a 5-4 Court held in Ali v. Federal Bureau of Prisons, that when the Federal Tort Claims Act, 28

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9 489 U.S. at 203, citing, Restatement (Second) of Torts § 323 (1965) (render[ing] services to another may in some circumstances be held liable for negligent action). Cf. Laura Oren, Safari Into the Snake Pit: The State-Created Danger Doctrine, 13 Wm. & Mary Bill Rts. J. 1165 (2005).


13 374 U.S. 150, 162-66 (1963). Since 1966, the FTCA has required the exhaustion of certain administrative procedures prior to filing suit. 28 CFR § 543.30-32 (2014).

14 128 S. Ct. 831, 840 (2008); id. at 849 (Kennedy, J., joined by Stevens, Souter & Breyer, JJ., dissenting) (the last phrase (“any other law enforcement officer”), properly read, shares the discrete
U.S.C. § 2680, withdrew from the United States’ waiver of sovereign immunity all claims arising from the detention of property by “any officer of customs or excise or any other law enforcement officer” that the phrase “any other law enforcement officer” was not limited to officers engaged in custom or excise activity. The majority noted that if Congress had intended a limited meaning it could have said “any other law enforcement officer acting in a customs or excise capacity.” As a result, prison officers who were alleged to have detained plaintiff’s property when plaintiff was being transferred from one federal prison to another were immune from suit.

As held in County of Sacramento v. Lewis, the deliberate indifference standard is employed only when actual deliberation is practical. Questions thus arise whether the official faced an emergency situation that was “rapidly evolving, fluid, and dangerous” and thus precluded “the luxury of calm and reflective deliberation.” A lower federal court has held that the issue may turn on whether the actors subjectively believed they were responding to an emergency, although an objective reasonable actor standard would be more consistent with governmental immunity law, as discussed at § 10.4.3(A) nn.68-70. See generally Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (intentional excessive force shown if force used was objectively unreasonable; do not have to show that officers were subjectively aware they crossed the line); id. at 2477 (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting) (objective unreasonableness does not equal intentional action); id. at 2479 (Alito, J., dissenting) (case should be dismissed as improvidently granted).

Where the injured person is a prisoner, a deliberate indifference claim may also be made under the Eighth Amendment. To show a violation of the Eighth Amendment, the prisoner must “produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendant’s deliberate indifference to that risk; and (3) causation.” Liability under this standard is not limited to injury caused by blows. It also may occur if prison officials are deliberately indifferent to a prisoner’s medical needs. The protections of the Eighth Amendment do not apply to pre-trial detainees, but

characteristics of the preceding phrases (“officer[s] of customs or excise” and “assessment or collection of any tax or customs duty”); “The seizure of property by an officer raises serious concerns for the liberty of our people and the Act should not be read to permit appropriation of property without a remedy in tort by language so obscure and indirect.” Concern about frivolous claims are mitigated because administrative procedures must be exhausted before a suit is allowed.).

15 County of Sacramento v. Lewis, 523 U.S. 833, 851-55 (1998) (no time to deliberate in high-speed car chase, where police officer actions resulted in death to fleeing suspect on motorcycle).

16 Neal v. St. Louis County Bd. of Police Commissioners, 217 F.3d 955, 958 (8th Cir. 2000).

17 Terrell v. Larson, 396 F.3d 975, 980 (8th Cir. 2005).

18 Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995).

19 Toguchi v. Chung, 391 F.3d 1051 (9th Cir. 2004). In Brown v. Plata, 131 S. Ct. 1910 (2011), a 5-4 Court upheld the power of courts to direct California officials to act within 2 years to
reduce the California prison population by 37,000 prisoners to address overcrowding conditions which denied prisoners with serious medical disorders and mental conditions Eighth Amendment rights to be free from cruel and unusual punishment. In dissent, formalist and Holmesian Justices said the courts were exceeding their institutional capacity in making the order.

§ 28.2 Life, Liberty, or Property Interests Under Due Process

Four different issues are involved in determining life, liberty, and property interests of persons under the Due Process Clauses of the Fifth and 14th Amendments. The first issue is who counts as a “person” for purposes of due process analysis, discussed at § 28.2.1. The second issue is how to define “life,” discussed at § 28.2.2. The third issue is how to define “liberty,” discussed at § 28.2.3. The fourth issue is how to define “property,” discussed at § 28.2.4.

1. Defining Persons under Due Process Analysis

As with the term “person” in the Equal Protection Clause, discussed at § 19.1 nn.5-6, the explicit text of the Due Process Clauses of the Fifth and 14th Amendments apply to “any person.” Thus, due process protections are not limited to “citizens,” and aliens are protected by the clause. During the formalist era, corporations, as well as partnerships or individual proprietorships, were held to be “persons” entitled to due process of law. In First National Bank of Boston v. Bellotti, a campaign financing case, Justice Rehnquist took the view that, even though corporations have due process rights regarding property, the liberty part of due process should be limited to natural persons. That view has not been adopted by any other Justice in modern times, although the distinction has some support from history and early legislative and executive practice, and does reflect an aside made, as Justice Rehnquist noted in Bellotti, in an old 1906 case. In Roe v. Wade, excerpted at § 26.1, the Court concluded that the term “person” refers only to postnatal individuals, i.e., only after birth.

reduce the California prison population by 37,000 prisoners to address overcrowding conditions which denied prisoners with serious medical disorders and mental conditions Eighth Amendment rights to be free from cruel and unusual punishment. In dissent, formalist and Holmesian Justices said the courts were exceeding their institutional capacity in making the order. Id. at 1951 (Scalia, J., joined by Thomas, J., dissenting); id. at 1959 (Alito, J., joined by Roberts, C.J., dissenting).


21 See, e.g., Smyth v. Ames, 169 U.S. 466, 522 (1898); Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150, 154 (1897), and cases cited therein.


Separate from this analysis under the 14th Amendment, about 20 states have laws that criminalize killing unborn human fetuses from conception onwards, with exceptions carved out for abortions, and seven other states have laws that criminalize killing unborn human fetuses some time after conception, but before viability. As long as these provisions do not conflict with the right to abortion identified in Roe and Casey, or any other federal constitutional or statutory provision, these laws are constitutional, as states can grant greater rights than exist under federal law.24

2. Life Interests Under Due Process Analysis

Under procedural due process analysis, deprivations of “life” occur in capital murder cases when the government imposes the death penalty on convicted felons. The Court has developed a specialized body of law dealing with what procedures are required in death penalty cases, often as a matter of the Eighth Amendment’s ban on “cruel and unusual punishment.” Consideration of those procedures take place in most law schools in a separate Criminal Procedure class or specialized course in Death Penalty law. The Court has held that claims against the police for impermissible use of deadly force in the context of making an arrest, investigatory stop, or other “seizure” of the person cannot be brought under the Due Process Clause, but must be brought under the Fourth Amendment as impermissible seizures.25 For example, in Tennessee v. Garner,26 the Court held that apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement, and that deadly force may not be used unless it is necessary to prevent the escape and “the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”

3. Liberty Interests Under Due Process Analysis

Constitutionally protected “liberty” interests include those “fundamental” aspects of the Bill of Rights incorporated into the 14th Amendment, noted at § 14.3.2, and those unenumerated fundamental rights “implicit in the concept of ordered liberty,” addressed in Chapters 25-27. This includes, as stated in Meyer v. Nebraska, excerpted at § 25.2, “freedom from bodily restraint.”

Reflecting this doctrine, in 1992 the Court noted in Foucha v. Louisiana,27 “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” As part of this freedom, the Court held in 1970 in In re Winship28


26 471 U.S. 1, 9-12 (1985).


that the Due Process Clause protects the accused against criminal conviction except on proof “beyond a reasonable doubt,” although that right is not textually specific in the Bill of Rights. The Court has also stated that government actions which “shock the conscience” can give rise to a deprivation of a liberty interest. The classic case of this kind occurred in *Rochin v. California*, in which it was held that the forced pumping of a suspect’s stomach to obtain evidence “shocked the conscience.” This right was viewed in *United States v. Salerno* as an “enumerated” liberty right, i.e., based directly on “liberty,” and distinguished from “unenumerated” rights “implicit in the concept of ordered liberty.”

In 1992, the Court considered another due process challenge to a criminal procedure not mentioned in the Bill of Rights. The Court held in *Medina v. California* that a state could require a defendant to carry the burden of proving his incompetence by a preponderance of the evidence. Writing for the Court in *Medina*, Justice Kennedy sought to bridge the differences between formalist and Holmesian emphasis on history and tradition, and instrumentalist concern with "fundamental fairness" implicit in our “concept of constitutionally ordered liberty.” He acknowledged that many precedents had used "fundamental fairness" in determining the meaning of the Due Process Clause, but that this mode of analysis should be used cautiously. Kennedy said, “In the field of criminal law, we have defined the category of infractions that violate ‘fundamental fairness’ very narrowly, based on the recognition that ‘[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.’ *Dowling v. United States*, 493 U.S. 342, 352 . . . (1990).” Emphasizing federalism concerns, Justice Kennedy added, “[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area.” Justice Kennedy concluded, “We cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”

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32 *Id.* at 443-46 (citations omitted). Justice O'Connor, concurring with Justice Souter, said that a historical pedigree can give a practice no more than a presumption of constitutionality. She pointed out that the Court's opinion allowed some weight to be given to considerations of fairness in operation, as she thought required by relevant precedents. Justice Blackmun's dissent, joined by Justice Stevens, stressed that the majority had acknowledged that an analysis of fundamental fairness must be done, and the Court must carefully balance the individual and governmental interests at stake. *Id.* at 455-56 (O'Connor, J., joined by Souter, J., concurring in the judgment); *id.* at 457-58 (Blackmun, J., joined by Stevens, J., dissenting).
In 2009, in *District Attorney’s Office v. Osborne*, Chief Justice Roberts wrote for a 5-4 Court that although a convicted felon could bring an action under 42 U.S.C. § 1983 to challenge Alaska’s refusal to turn over DNA evidence in its possession for testing, there was nothing fundamentally unfair in the Alaska requirement that a prisoner show that the evidence was diligently pursued and was sufficiently material. Nor was there a showing that its law was improperly applied, since the plaintiff had not tried to use state post-conviction procedures. So there was no violation of procedural due process. As for plaintiff’s claim that the state’s refusal to make the DNA evidence available to him was a violation of substantive due process, the Court expressed reluctance to extend substantive due process and thus to short circuit what looks to be a prompt and considered legislative response among the states to the problems of post-conviction use of DNA. Reacting to the facts of the case, Justice Alito concurred with Justices Kennedy and Thomas. Justice Alito said that when a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant has no constitutional right to demand DNA testing after conviction.

Protected liberty interests also arise from certain expectations of freedom, e.g., freedom from unjustified intrusions on personal security. For example, as noted at § 28.1 n.8, where a person has been deprived of liberty by being placed in jail, a mental institution, or foster care, the Court has held due process rights attach to a certain level of safety and security. In contrast, in *Collins v. City*
of Harker Heights, the Court held that the Due Process Clause does not create a right that the government must provide its workers with a safe working environment. The Court noted that the "Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." In United States v. Howard, the Ninth Circuit held that pretrial detainees have a liberty interest in not being automatically “shackled” during court appearances, but that the government had shown their policy of requiring leg shackles for an initial court appearance before a magistrate was “reasonably related” to “legitimate” interests in security in the courtroom and budgetary considerations in not having to make individualized assessments of dangerousness.

In terms of constitutional liberty interests enjoyed by prisoners, inmates have a due process right to be free from restraints which extend the sentence in an unexpected manner as by transfer to a mental hospital, or the involuntary administration of psychotropic drugs. Based on the liberal instrumentalist predisposition to protect the unempowered in society, the instrumentalist Court held in 1974 in Wolff v. McDonnell that a liberty interest was also created by a statute which mandated sentence reductions for good behavior. The Court said that to deprive a prisoner of this interest, without a hearing, would be to interfere with a right of “real substance.” In contrast, in Meachum v. Fano, a prisoner’s transfer to a maximum security facility was held to be within the normal range of custody which the conviction authorized the state to impose, and so no protected liberty interest was implicated. Dictum in that case mentioned that the state action, according to state law, was discretionary rather than mandatory. The Court built on this idea in 1983 in Hewitt v. Helms, where the Court expanded prisoner protections by holding that a liberty interest is created whenever prison guidelines contain mandatory language, without regard to the “real substance” test.

The Court has withdrawn somewhat from prison oversight during the post-instrumentalist era. In 1995, in Sandin v. Conner, a 5-4 Court drew back from both Hewitt and Wolff. Chief Justice

35 463 F.3d 999, 1005-07 (9th Cir. 2006).
41 515 U.S. 472, 477-87 (1995). Dissenting in Sandin, Justice Ginsburg, joined by Justice Stevens, said that the prisoner in that case should have been viewed as having a liberty interest because the punishment effected a severe alteration in the conditions of his incarceration. Justice Breyer, dissenting with Justice Souter, agreed that the prisoner’s punishment was a fairly major
In addition, the state had created disincentives for states to codify prison management procedures and had involved federal courts in the day-to-day management of federal prisons, and that Wolff involved the Court in determining what rights the Court thought were of “real substance.” Henceforth, he wrote, the Court will not recognize as creating a liberty interest those prison regulations which (1) do not exceed the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, and (2) do not impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. The Chief Justice, writing for himself and for Justices Kennedy, O'Connor, Scalia and Thomas, held that a 30-day disciplinary confinement of a person doing 30 years to life, under conditions not much different than administrative segregation or protective custody, was not such a deprivation as to invoke the guarantees of the Due Process Clause. Nor was there a liberty interest in freedom from intrastate prison transfers, or transfers to less amenable quarters for non-punitive reasons. In 2005, in Wilkinson v. Austin, a unanimous Court held that prisoners do have a liberty interest in avoiding placement in highly restrictive maximum security facilities, known as “supermax” placements, because such placements do impose an “atypical and significant hardship” under any plausible definition of that phrase.

The Court has also stated that individuals have a liberty interest in their own reputation not being stigmatized by the government. This is particularly true where such stigmatization might interfere with the individual’s ability to get a job, and thus interfere with the liberty interest in engaging in the common occupations of life. In 1972, in Board of Regents v. Roth, the Court considered whether the refusal to rehire an employee on a one-year probationary contract resulted in an improper stigmatization. Since the employee had no expectation of employment, no stigmatization was found. Under this doctrine, something more than mere defamation is required, since defamation is a state common-law tort action, not a constitutional due process concern. Instead, what is required is: (1) the utterance of a statement sufficiently derogatory to injury the individual’s reputation, that is capable of being proved false, and (2) a state-imposed burden or state-imposed alteration of the plaintiff’s status or rights. Where such a deprivation can be proven, the individual would have a procedural due process complaint, which would trigger an action under 42 U.S.C. § 1983 for government deprivation of a constitutional right.

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43 408 U.S. 564, 572-75 (1972).

44 See Sadallah v. City of Utica, 383 F.3d 34, 38 (2nd Cir. 2004).
In 1976, in *Paul v. Davis*, the Court held that government action that stigmatizes an individual, but which is unconnected to other liberty interests, such as engaging in the common occupations of life, does not trigger a due process analysis. In *Davis*, the government circulated a flyer stating that a person was a “known shoplifter,” after the person had been arrested, but not convicted of that crime. The charge was subsequently dismissed. Under *Davis*, that person had no due process claim since the individual could not show harm to employment opportunities. The Court’s decision in *Paul v. Davis* has been subject to much academic criticism, both for being inconsistent with existing precedent when the case was decided, and on policy grounds, but it remains the law today.

4. Property Interests Under Due Process Analysis

Constitutionally protected property interests are not created by the Constitution or individual expectations but, rather, by rules or understandings stemming from state or federal law. Such interests can arise from federal or state statutory or constitutional provisions, or as a matter of state common law property rights. If state law creates a property interest, e.g., provides that an employee may be dismissed only for cause, the minimum procedural safeguards for the deprivation are then fixed by the Court. For this to apply, of course, the employee must have a property interest. If the employment is at-will, no property right would be created.

During the formalist and Holmesian eras, the Court allowed states and the federal government to deprive persons of important interests, such as occupational licenses, “upon the conditions it imposes” under the government’s “substantially plenary power,” if the interest were classified as a "privilege" rather than a "right." A substantial transformation occurred in the instrumentalist era. In *Goldberg v. Kelly*, excerpted below, the Court held that before a state may terminate welfare payments under the Aid to Families with Dependent Children program it must provide a pre-termination hearing. Justice Brennan explained that welfare recipients have a property interest in

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47 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-78 (1972).


continuing to receive payments and a hearing would help prevent unfair or mistaken deprivations of the property interest that welfare recipients had in continuing to receive payments. He drew on the factual perspective of Charles Reich's article on "The New Property," published in the *Yale Law Journal*. Reich argued that government has emerged as a major source of wealth, and that it pours forth money, benefits, services, contracts, franchises, and licenses on a vast, imperial scale. Thus, an entitlement to government benefits is today an important interest, a new form of property.

**Goldberg v. Kelly**  
**397 U.S. 254 (1970)**

Justice BRENNAN delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. [FN 8: It may be realistic today to regard welfare entitlements as more like “property” than a “gratuity.” Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that “[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.” Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L.J. 733 (1964).]

The constitutional challenge cannot be answered by an argument that public assistance benefits are “a ‘privilege’ and not a ‘right.’” Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551 (1956). The extent to which

procedural due process must be afforded the recipient is influenced by the extent to which he may be “condemned to suffer grievous loss,” Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 895 (1961), “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”

Justice BLACK, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter. Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court “that to cut off a welfare recipient in the face of . . . ‘brutal need’ without a prior hearing of some sort is unconscionable,” and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing “the recipient's interest in avoiding” the termination of welfare benefits against “the governmental interest in summary adjudication.” Ante, at 1018. Today's balancing act requires a “pre-termination evidentiary hearing,” yet there is nothing that indicates what tomorrow's balance will be. . . .

Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party “owing” the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pretermination evidentiary hearings or post any bond, and in all “fairness” it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.
. . . . [T]he inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full “due process” proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

. . . . The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

[Ed: This part of the decision that due process doctrine was triggered by the termination of benefits was 8-1. The dissents in this case of Chief Justice BURGER, joined by Justice BLACK, and Justice STEWART, on the precise scope of what due process rights are required, are excerpted at § 28.3.]

A year after Goldberg v. Kelly was decided, the Court another big step in Bell v. Burson.53 There Justice Brennan wrote for the Court that a state could not suspend the license of an uninsured motorist who failed to post security after an accident unless the motorist was first provided with notice and a hearing. Justice Brennan said the suspension involved state action which adjudicated an "important interest" of the licensee. He said that constitutional results no longer depend on the distinction between "rights" and "privileges."

The movement begun in Goldberg and Bell towards requiring a hearing when the government terminates or does not renew something important to an individual reached a limit in Board of Regents v. Roth.54 In Roth, a college teacher claimed to have a property interest in his job with a state college. He had been employed for a year, but not re-employed. No liberty interests were created by the Constitution or by state law because the employee, not having been charged with anything and with no stigma having been imposed, was as free as before to seek new employment. Regarding possible property interests, the Court conceded that persons may develop a legitimate claim of entitlement to a specific benefit on which they rely in their daily lives. However, property interests are not created by the Constitution itself or by individual expectations. Instead, "property" is created by existing rules or understandings which stem from an independent source such as state or federal law. Here, where a teacher was hired for one year only, and neither the terms of the contract nor any common law of re-employment secured an interest in re-employment for the following year, the teacher had no property interest sufficient to require the state university to hold a hearing before declining to renew the teacher's contract.


In a variation of Roth facts, a teacher in Perry v. Sindermann\(^5\) was held entitled to notice of reasons for not being re-hired if he could show there was an unwritten "common law" practice at a university that certain employees, including himself, who had been employed for four successive years under a series of one-year contracts, should have the equivalent of tenure. While the Court agreed in Perry that this employee did have a property interest based on an implied contractual right, courts have been reluctant to find such implied rights, although a few cases have been found based on mutual understandings, oral contracts, or a right to avoid being stigmatized by a premature firing.\(^5\)

Regarding other kinds of government action, the Court held in Town of Castle Rock, Colorado v. Gonzales\(^5\) that an individual has no property interest in having the police enforce a restraining order obtained from a state court, even on the relatively extreme facts of a domestic violence restraining order against a husband who had taken his three daughters in violation of the order. The husband subsequently murdered them. The Court said that a Colorado statute calling on police officers to use every reasonable means to enforce a restraining order was not intended either to make enforcement mandatory or to give an individual an enforceable property right under the Due Process Clause to sue if it is not properly enforced. Concurring, Justice Souter, joined by Justice Breyer, noted that property interests arise from substantive rights, and the Court had never recognized a property right in procedural obligations imposed on state officials to protection.

In the context of tort litigation, an issue has arisen whether the individual’s “property” interest in the litigation gives rise to due process rights that would limit the ability of states through tort reform statutes to place limits on tort actions, such as capping recovery for pain and suffering or punitive damages awards. While such due process arguments have usually failed under the United States Constitution, “open courts” or “right to remedy” or “right to jury trial” provisions in a number of state Constitutions have been used to place limits on such statutory enactments, consistent with the natural law principle that “where there is a right, there should be a remedy.”\(^5\)

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\(^{55}\) 408 U.S. 593, 602 (1972).


\(^{57}\) 125 S. Ct. 2798, 2803-06 (2005); id. at 2811-13 (Souter, J., joined by Breyer, J., concurring). Dissenting, Justice Stevens, joined by Justice Ginsburg, said the Court should have deferred to the decision on the Court of Appeals that the state law had created a property interest, or, in any event, certify that question to the Colorado Supreme Court. If the Court were to make the decision, the dissent would have held a property right was created, based on a reading that Colorado statutes, like many recent statutes in states, made arrest mandatory in the domestic violence context. Id. at 2814-16, 2822-24 (Stevens, J., joined by Ginsburg, J., dissenting).

§ 28.3 What Process is Due Under Due Process

1. General Considerations

A. Void for Vagueness Challenges

As the Court noted in *Grayned v. City of Rockford*, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." The Court has said:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone’ . . . than if the boundaries . . . areas were clearly marked.”

As this quote indicates, the Court has a special concern for vagueness in the context of First Amendment cases, particularly those involving freedom of speech. Vagueness in that context is addressed at CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: VOLUME 3, at § 5.3.1 (2018 ORIG. ED. 2014) (available at: http://libguides.stcl.edu/kelsomaterials). In other areas, while the formalist-era Court struck down some economic regulations as unconstitutionally vague, and the instrumentalist Warren Court struck down a few criminal statutes as unconstitutionally vague, the Holmesian-era and modern natural law era courts have been

*Provisions in State Constitutions and the Proper Role of the State Courts*, 26 Wake Forest L. Rev. 237 (1991) (including Appendix compiling state constitutional provisions). On state tort reform efforts, and successes in challenging them under “open courts” provisions, see also § 17.4 nn.67-68.


60 Id. at 108-09 (citations omitted).


62 See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (provision of the Louisiana Subversive Activities and Communist Control Law defining subversive organization unduly vague and uncertain); *Ashton v. Kentucky*, 384 U.S. 195 (1965) (elements of common-law crime of criminal libel are so indefinite and uncertain that it should not be enforced as a penal offense); *Giaccio v.*
relatively tolerant of the difficulties of legislative drafting, although some exceptions do exist, often
where some modern formalist and instrumentalist Justices have joined forces to make a majority.63

B. The Mathews v. Eldridge Test

Once a deprivation of the life, liberty, or property interest is established, deciding what procedures
are required by due process depends on weighing the competing interests involved. As stated in the
foundational case of Mathews v. Eldridge,64 this involves balancing:

(a) the private interest that will be affected;
(b) the risk of an erroneous deprivation through present procedures and the probable value, if
any, of additional or substitute procedures; and
(c) the government's interest, including the function involved and the fiscal or administrative
burdens that the additional or substitute procedures would entail.

Pennsylvania, 382 U.S. 399 (1966) (statute which in practice permitted juries to impose court costs
on a defendant found not guilty if they find the conduct, though not unlawful, is “reprehensible in
some respect,” “improper,” outrageous to “morality or justice,” the conduct was “not reprehensible
enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of
costs,” or though acquitted “his innocence may have been doubtful,” unconstitutionally vague).

63 On exceptions, see, e.g., Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (term “crime of
violence” in the Immigration and Nationality Act, defined as “substantial risk that physical force
against the person or property of another may be used” is unconstitutionally vague; under the Act
a person convicted is virtually guaranteed to be deported) (Gorsuch, J., concurring in part and
concurring in the judgment) (Roberts, C.J., joined by Kennedy, Thomas & Alito, JJ., dissenting);
Johnson v. United States, 135 S. Ct. 2551 (2015) (Scalia, J., for the Court) (term “violent felony”
in the Armed Career Criminal Act, defined as “conduct that presents a serious potential risk of
physical injury to another” is unconstitutionally vague; under the Act three prior convictions for a
violent felony triggered a mandatory 15-year minimum sentence) (Justices Kennedy, Thomas, and
Alito dissented from this conclusion); City of Chicago v. Morales, 527 U.S. 41 (1999) (statute
allowing police officer to order party to disperse upon reasonable belief person is “a criminal street
gang member loitering in any public place with one or more other persons” vague); Lanzetta v. New
Jersey, 306 U.S. 451 (1939) (statute that punished persons with prior convictions "known to be a
member of any gang consisting of two or more persons" vague). But see Munn v. City of Ocean
Springs, Mississippi, 763 F.3d 437 (5th Cir. 2014) (ordinance making unlawful “unreasonable
noise” that “annoys” or “disturbs” a “reasonable person of normal sensitivities” not vague); Keating
v. University of South Dakota, 569 Fed. App’x 469 (8th Cir. 2014) (“civility clause” in university
employment policy not vague). For other cases, see CHARLES D. KELSO & R. RANDALL KELSO, THE
PATH OF CONSTITUTIONAL LAW (2007) (2018 Supplement at § 27.4.3.1, n.342 (page 2108)

The *Mathews* test is a classic example of “second-order” reasonableness balancing, which weighs the government’s legitimate interests in accurate decisionmaking and fiscal and other administrative cost savings, against the risk of erroneous decisionmaking through any particular procedural means or any alternative procedural requirements, and the individual’s interest in not being improperly deprived to determine if any set of procedures represent an unreasonable accommodation of these interests. Consistent with “second-order balancing,” the challenger has the burden to overcome deference to “good-faith judgments” of the government that “the procedures they have provided assure fair consideration” to establish that the government’s procedures violate due process.65

In applying this test, the Court has indicated that due process usually requires an opportunity for notice and some kind of hearing before the deprivation. However, the government can act without advance procedures if it is not practicable to provide a pre-deprivation hearing,66 or there is no likelihood of serious loss and informal procedures are sufficiently reliable to minimize the risk of error.67 State tort remedies usually are adequate post-deprivation procedures for deprivations resulting from intentional torts.68 But those remedies are not sufficient for some losses caused by state policy, such as violations of anti-discrimination rules in employment,69 or not using involuntary confinement procedures before confining a mentally ill person, where the government did not take any steps to ascertain whether the individual was mentally competent to sign the admission forms.70

In making the determination of what procedures are required to satisfy due process, formalist judges, focused on traditional practices, and Holmesian judges, focused on deference to government, will typically be satisfied with fewer procedural requirements, while liberal instrumentalists will often only be satisfied with more procedural requirements. The main issues of contention involve whether the individual gets: (1) a pre-termination hearing, or only a post-termination hearing; (2) an oral hearing, or submission of written documents only; (3) the right to cross-examine witnesses, or only the right to tell one's own story; (4) a formal hearing record prepared, or only an informal record; (5) the right to court-appointed counsel if indigent (usually not granted), or only the right to have counsel present (usually granted); and (6) the standard of proof required to support the deprivation (preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt).

65  *Id.* at 348-49.


Justice BRENNAN delivered the opinion of the Court.

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967). Thus the crucial factor in this context – a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended – is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of

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the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 294 F.Supp., at 904-905.

[T]he pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings [Ed.: particularly on whether the claimant is receiving additional support from a live-in partner who disappears when the supervising social worker visits], written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually
gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, pt. IV, § 6400(a).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-04 (1963).

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” Powell v. Alabama, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 13595 (1969).

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937); United States v. Abilene & S.R. Co., 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. In re Murchison, 349 U.S. 133 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.


The procedures for review of administrative action in the “welfare” area are in a relatively early stage of development; HEW has already taken the initiative by promulgating regulations requiring that AFDC payments be continued until a final decision after a “fair hearing” is held. [FN1: 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969).] The net effect would be to provide a hearing prior to a termination of benefits. Indeed, the HEW administrative regulations go far beyond the result reached today since they require that recipients be given the right to appointed counsel [FN2: 45 CFR s 220.25, 34 Fed. Reg. 1356 (1969). See also HEW Handbook, pt. IV, §§ 2300(d)(5), 6200-6400], a position expressly rejected by the majority. As the majority notes, see ante, at 1014 n.3, these regulations are scheduled to take effect in July 1970. Against this background I am baffled as to why we should engage in “legislating” via constitutional fiat when an apparently reasonable result has been accomplished administratively.
That HEW has already adopted such regulations suggests to me that we ought to hold the heavy hand of constitutional adjudication and allow evolutionary processes at various administrative levels to develop, given their flexibility to make adjustments in procedure without long delays. This would permit orderly development of procedural solutions, aided as they would be by expert guidance available within federal agencies which have an overview of the entire problem in the 50 States. I cannot accept – indeed I reject – any notion that a government which pays out billions of dollars to nearly nine million welfare recipients is heartless, insensitive, or indifferent to the legitimate needs of the poor.

The Court's action today seems another manifestation of the now familiar constitutionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the invitation to find a constitutionally “rooted” remedy. If no provision is explicit on the point, it is then seen as “implicit” or commanded by the vague and nebulous concept of “fairness.”

I can share the impatience of all who seek instant solutions; there is a great temptation in this area to frame remedies that seem fair and can be mandated forthwith as against administrative or congressional action that calls for careful and extended study. That is thought too slow. But, however cumbersome or glacial, this is the procedure the Constitution contemplated.

I would not suggest that the procedures of administering the Nation's complex welfare programs are beyond the reach of courts, but I would wait until more is known about the problems before fashioning solutions in the rigidity of a constitutional holding.

Justice STEWART, dissenting.

Although the question is for me a close one, I do not believe that the procedures that New York and California now follow in terminating welfare payments are violative of the United States Constitution. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894-897.

Mathews v. Eldridge
424 U.S. 319 (1976)

Justice POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U.S.C. § 423. Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not
improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. 361 F.Supp. 520 (W.D.Va.1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which established a right to an “evidentiary hearing” prior to termination of welfare benefits. The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits . . . is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR §§ 404.917, 404.927 (1975). The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. § 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, § 404.945, and finally may obtain judicial review. 42 U.S.C. § 405(g); 20 CFR § 404.951 (1975).
Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. § 404. If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. § 404.

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in Goldberg, see 397 U.S., at 263-264, the nonprobationary federal employee in Arnett, see 416 U.S., at 146, and the wage earner in Sniadach. See 395 U.S., at 341-342.

Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence: “The crucial factor in this context a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.” 397 U.S., at 264 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the “many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . .” Richardson v. Belcher, 404 U.S., at 85-87 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

As we recognized last Term in Fusari v. Steinberg, 419 U.S. 379, 389 (1975), “the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests.” The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. id., at 383-384, and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need
is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. See Arnett v. Kennedy, supra, 416 U.S., at 169 (Powell, J., concurring in part); id., at 201-202 (White, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 617 (1974); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of “medically acceptable clinical and laboratory diagnostic techniques,” 42 U.S.C. § 423(d)(3), that he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .” § 423(d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. Goldberg noted that in such circumstances “written submissions are a wholly unsatisfactory basis for decision.” 397 U.S., at 269.

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon “routine, standard, and unbiased medical reports by physician specialists,” Richardson v. Perales, 402 U.S., at 404, concerning a subject whom they have personally examined. In Richardson the Court recognized the “reliability and probative worth of written medical reports,” emphasizing that while there may be “professional disagreement with the medical conclusions” the “specter of questionable credibility and veracity is not present.” Id., at 405, 407. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in Goldberg.

The decision in Goldberg also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the “educational attainment necessary to write effectively” and could not afford professional assistance. In addition, such submissions would not provide the “flexibility of oral presentations” or “permit the recipient to mold his argument to the issues the decision maker appears to regard as important.” 397 U.S., at 269. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.
The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law Cases and Comments 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in Goldberg, enable the recipient to “mold” his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%. Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases, in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case. In striking the appropriate due process balance the final factor to be assessed is the public interest.

This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.
Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, supra, 123 U. Pa. L. Rev., at 1276, 1303.

Justice STEVENS took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in Richardson v. Wright, 405 U.S. 208, 212 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U.S.C. § 601 et seq. See Goldberg v. Kelly, 397 U.S. 254 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

With respect to the need for a pre-deprivation hearing, a 5-4 Court decided in United States v. James Daniel Good Real Property that unless exigent circumstances are present the Constitution requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. Justice Kennedy wrote for himself and Justices Blackmun, Stevens, Souter, and Ginsburg, that in the case of a yacht the government could seize the property first and give the owner a hearing later, since the property at issue could sail away. However, in the usual case of a house, apartment building, or business, prosecutors have no such worry, said Kennedy. Chief Justice Rehnquist dissented on this point, as did Justices O'Connor, Scalia, and Thomas. In his dissent, Rehnquist said that pre-hearing real property seizure had served important government purposes in combating illegal drugs, because the seized property had often been used

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71 510 U.S. 43, 52-61 (1993); id. at 72 (Rehnquist, C.J., joined by Scalia, J., and O’Connor, J., as to Parts II and III, concurring in part and dissenting in part); id. at 80-85 (Thomas, J., concurring in part and dissenting in part).
to facilitate the commission of a drug crime, and that giving the owners prior notice and a hearing before seizure could permit the properties to be “damaged or destroyed to prevent them from falling into the hands of the Government.” In his dissent, Justice Thomas noted that while protecting property rights of “innocent owners” is certainly a laudable goal, in this “as applied” challenge by this drug dealer, prior precedents did not give this owner the right to a pre-deprivation hearing.

The *Mathews v. Eldridge* balancing test is constitutionally required. Thus, although the government has great latitude in determining whether to create a property interest, once the interest is created the Court will determine whether the procedures employed for its deprivation are constitutionally sufficient. Originally, Justice Rehnquist argued for a different approach. Writing a three-Justice plurality opinion in *Arnett v. Kennedy*,\(^72\) decided in 1974, Justice Rehnquist said that when an employment contract for a government job appears to grant a protected job status (e.g., discharge only for "cause"), but also provides procedures for discharge, only those procedures need be used since the employee "takes the bitter with the sweet." The six other Justices joined in opinions that indicated that the Constitution determines the process needed to deprive the employee of such a job.

Even if the Constitution determines the ultimately required procedures, Justice Stevens observed in *Bishop v. Wood*\(^73\) that the "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways." In *Bishop*, a police officer had been hired as a "permanent employee" but under the city ordinance, as interpreted by the lower courts, to which the Court gave deference, the employee's removal was conditioned on compliance with certain procedures and he was essentially employed "at will."

Justice Brennan, dissenting with Justice Marshall, said in *Bishop* that being discharged for "conduct unsuited to an officer" would harm the ex-employee's job prospects, and the Court's inquiry should be whether it was objectively reasonable for the employee to believe he could rely on continued employment. Justice White, dissenting, with Justices Brennan, Marshall, and Blackmun, said that since the ordinance granted a right to the job unless there were grounds to fire, it was wrong to cut back on that assurance by alluding to associated procedures, because the Constitution determines the process to be applied in connection with any state decision to deprive an employee of a job.\(^74\)

\(^{72}\) 416 U.S. 134, 135 (1974) (plurality opinion Rehnquist, J., joined by Burger, C.J., and Stewart, J.); id. at 166-67 (Powell, J., joined by Blackmun, J., concurring in part and dissenting in part); id. at 177-78 (White, J., concurring in part and dissenting in part); id. at 210-11 (Marshall, J., joined by Douglas & Brennan, JJ., dissenting).


\(^{74}\) Id. at 350-53 (Brennan, J., joined by Marshall, J., dissenting); id. at 355-61 (White, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting).
In *Codd v. Velger*, Justice Stevens, dissenting on other grounds, explained that his opinion in *Bishop* did not depart from the view of the majority of Justices in *Arnett* because *Bishop* was based on a conclusion that under the state law plaintiff could be discharged at will, and "a hearing would have been pointless because nothing plaintiff could prove would entitle him to keep his job."

The view that six Justices expressed in separate opinion in *Arnett* clearly prevailed in 1985, when the Court decided *Cleveland Board of Education v. Loudermill*. In that case a state was required to provide at least an informal pre-deprivation opportunity for an employee to learn about and answer charges before being removed from a civil service position. Justice White wrote for the Court that the categories of substance and procedure are distinct. If a property interest in public employment is conferred by the legislature, the state may not authorize the deprivation of that interest without appropriate procedural safeguards. Justice Rehnquist, dissenting, said that the Court had ignored its duty under *Roth* to rely on state law as the source of property interests, because the state law only granted the property right subject to certain procedural limitations. But this view did not prevail. As Justice White noted, the Court has rejected such a “‘bitter with the sweet’ approach. . . . Were the rule otherwise, the Clause would be reduced to a mere tautology. ‘Property’ cannot be defined by the procedures provided for its deprivation any more than can life or liberty.”

### 2. Case Examples of Procedural Due Process Analysis

As the Court noted in *Zinermon v. Burch*, under the *Mathews v. Eldridge* balancing text, due process “is a flexible concept that varies with the particular situation.” For deprivations of liberty interests done through the criminal justice system, a whole range of procedural protections apply, from Fourth Amendment search and seizure protections; to Fifth Amendment due process, double jeopardy, and privilege against self-incrimination protections; to the Sixth Amendment right to a fair trial, to confront witnesses, and to have the assistance of counsel for indigent defendants in any felony case or misdemeanor case in which incarceration is imposed; to the Eighth Amendment ban on excessive bail, excessive fines, and cruel and unusual punishment. These rights are typically addressed in a separate Criminal Procedure course. Prisoners also have protected liberty interests during incarceration, as discussed at § 28.2 nn.29-42, as well as rights of access to courts, discussed at § 27.2 n.59, and limited rights to vote, discussed at § 24.2 nn.9-12.

For serious liberty deprivations outside the context of the criminal justice system, such as for involuntary commitment to a mental hospital, discussed at § 28.3.2(A), or termination of parental rights, discussed at § 28.3.2(B), courts tend to require a number of procedural protections, although not as many as in the criminal justice context. For serious property deprivations, as in some government entitlement cases, discussed at § 28.3.2(C), less procedures may be required than in the context of serious liberty deprivations, but more procedures are required than for other kinds of

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76 470 U.S. 532, 540-43 (1985); *id.* at 561-63 (Rehnquist, J., dissenting).

property deprivations. Less procedures tend to be required for deprivations of property in standard workplace cases, discussed at § 28.3.2(D); license termination or utility service termination cases, discussed at § 28.3.2(E); or creditor-debtor cases, discussed at § 28.3.2(F). Even fewer procedures tend to be required when dealing with the due process rights of children at school, discussed at § 28.3.2(G), or for “enemy combatants” or other persons detained during military action, the “war on terrorism,” or as part of immigration enforcement, noted at § 28.3.2(H). Minimal due process arguments apply to government delegation of public functions to private parties, discussed at § 28.3.2(I), or the government adopting rules drafted by private parties, discussed at § 28.3.2(J).

As noted at § 28.3.1 text following n.70, six main issues arise in procedural due process cases. For more serious liberty or property deprivations, the key issues involved in the due process cases tend to be the standard of proof required to support the deprivation (preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt), and whether there exists a right to court-appointed counsel if indigent, or only the right to have counsel present. In these cases, pre-deprivations hearings are almost always required, and a formal record is kept. For somewhat less serious deprivations, there may be an issue whether a pre-termination hearing is required, or is a post-termination hearing sufficient, and an issue whether a formal record is required, or only an informal record must be kept. For even less serious deprivations, there will be an issue whether an oral hearing is required, or can submission be by written documents only, and whether there is a right to cross-examine witnesses, or only the right to tell one's own story. Each of these procedural requirements are discussed in the case examples which follow.

A. Mental Hospital Commitment Cases

In *Addington v. Texas*, 78 a unanimous Court held that the involuntary commitment of an adult to a mental hospital requires “clear and convincing evidence” that the person is dangerous to himself/herself or to others. The Court noted that the high value placed on the liberty interest required the state to meet more than a mere “preponderance of the evidence” standard, but that since the case did not raise criminal concerns, the “beyond a reasonable doubt” standard, constitutionally required in criminal trials under *In re Winship*, discussed at § 28.2.3 n.28, did not apply.

In *Parham v. J.R.*, 79 the Court held that prior to a child being committed to a mental hospital, a neutral fact-finder, such as a staff physician, must evaluate the child's condition to determine whether a treatable mental illness exists. Only a preponderance of the evidence standard was used, and no hearing was required, in part because the issues to be determined are “medical in character,” and “we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing.” In addition, the

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79 442 U.S. 584, 606-16 (1979); *id.* at 625-33 (Brennan, J., joined by Marshall & Stevens, JJ., concurring in part and dissenting in part).
Court noted that “requiring a formalized, factfinding hearing” poses a risk of “significant intrusion into the parent-child relationship” by employing “an adversary contest to ascertain whether the parents' motivation is consistent with the child’s interests” and possibly “exacerbat[ing] whatever tensions already exist between the child and the parents [creating] a serious risk that an adversary confrontation will adversely affect the ability of the parents to assist the child while in the hospital [and] make [the] subsequent return home more difficult.” The Court did require that the child must be interviewed and the investigation must make use of all available sources to probe the child's background. However, absent a finding of abuse or neglect, the presumption exists that the parents are acting in the best interests of the child. In dissent, instrumentalist Justices Brennan, Marshall, and Stevens would have required a pre-confinement hearing for juvenile wards of the state, a post-confinement hearing for commitments by parents of their child, and would not apply the presumption that parents are acting in the best interests of the child when recommending institutionalization.

**B. Parental Rights Termination Cases**

In *Lassiter v. Department of Social Services*, a majority of the Court concluded that there was no automatic right to have counsel provided to indigent parents seeking to contest parental termination proceedings. The Court noted that an absolute right to counsel has only been recognized to exist where the litigant may lose his physical liberty if he loses the litigation, as in the famous case of *Gideon v Wainwright*. Given the importance of parental rights, however, the Court indicated that whether a right to counsel exists should be determined on a case-by-case basis. Where the case is complicated, such as involving expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, or the parents have little education, an uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation, appointed counsel may well be required for such indigent parties. The Court also noted that a clear majority of states by statute provide for counsel for indigent parents in all parental termination cases. An instrumentalist dissent of Justice Blackmun, joined by Justices Brennan and Marshall, concluded that counsel should be provided in every case of parental termination under the Due Process Clause.

In *Santosky v. Kramer*, the Court concluded that termination of parental rights requires “clear and convincing evidence,” a standard consistent with the statutes in a majority of states at the time. The Court noted that like “civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty,” and that, as in *Addington*, an “elevated standard of proof in a parental

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rights termination proceeding would alleviate ‘the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior.’” A formalist and Holmesian dissent said that the existing “preponderance of the evidence” standard was sufficient to satisfy due process, and that the Court should be reluctant to impose federal due process standards on a matter of traditional state control. In part, the dissent viewed the case as a less serious deprivation than in Addington regarding involuntary commitment to a mental hospital, where a unanimous Court had required “clear and convincing evidence.”

C. Government Entitlement Cases

In Goldberg v. Kelly,82 excerpted at § 28.3.2, the Court held that a pre-termination evidentiary hearing was required for termination of Aid to Families with Dependent Children (AFDC) welfare benefits. In Mathews v. Eldridge,83 excerpted at § 28.3.2, the Court held that a pre-termination hearing was not required in Social Security Disability cases because the individual interest in disability benefits was not as great as the interest in Goldberg, and the risk of erroneous deprivation was smaller than in Goldberg. The issue of a pre-termination or post-termination hearing is important, since the post-termination hearing often takes place 6 months, a year, or more after the initial decision, and only rarely is such a delay itself held to violate due process.84

Although the issue is not without debate, the better argument would seem to be that any attempt to condition receipt of welfare benefits on production of specific “proof of citizenship,” through ID cards or otherwise, should be viewed as an aspect of terminating welfare benefits, and subject to Mathews analysis, rather than an economic or social regulation regarding receipt of welfare benefits, triggering only minimum rationality review under the Due Process Clause.

D. Workplace Cases

In Cleveland Board of Education v. Loudermill,85 the Court held that a classified civil servant under Ohio law who could be fired only for good cause was entitled to oral or written notice of charges, an explanation of the employer's evidence, and an opportunity to present the employee’s side of the story in an informal pre-termination hearing. The Court noted that the “need for some form of


85 470 U.S. 532, 542-48 (1985); id. at 548 (Marshall, J., concurring in part and concurring in the judgment); id. at 552-53 (Brennan, J., concurring in part and dissenting in part); id. at 559-63 (Rehnquist, J., dissenting) (under Arnett, discussed at 28.3.1 nn.72-76 , plaintiff got due process).
pretermination hearing . . . is evident from a balancing of the competing interests at stake,” particularly “the severity of depriving a person of the means of livelihood.” The Court also observed that the constitutionality of such a limited pre-termination hearing “rests in part on the provisions in Ohio law for a full post-termination hearing.” Instrumentalist Justices Marshall and Brennan would have required in addition the right to confront and cross-examine witness at the pre-termination hearing.

E. License Termination or Utility Termination Cases

In Bell v. Burson, a unanimous Court held that under Georgia's "fault-oriented scheme," to deprive someone of their driver's license requires, at the very least, a prior hearing to make a probable-cause determination as to the “reasonable possibility of a judgment” being rendered against the individual “as a result of the accident.” Similarly, in In re Ruffalo, the Court held in the case of revocation of a professional license, the government must grant the individual a hearing to determine fitness to be a member of the profession. As stated in Ruffalo, a case involving disbarment of any attorney, “Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. [The attorney] is accordingly entitled to procedural due process, which includes fair notice of the charge. . . . [W]hen proceedings for disbarment are ‘not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded [the attorney] for explanation and defence.’”

Terminations of utility service raise similar due process concerns. However, where the potential length or severity of the deprivation does not indicate a likelihood of serious loss, and where the procedures adopted by the utility are sufficiently reliable to minimize the risk of erroneous determination, a prior hearing may not be required. For example, in Memphis Light, Gas & Water Div. v. Craft, the Court required only notice informing the customer not only of the possibility of termination, but also of a procedure for challenging a disputed bill or other specified avenue of relief for customers who dispute the existence of the grounds for termination.

F. Creditor/Debtor Cases

The Court has considered a sequence of cases dealing with the due process rights of debtors before creditors may engage in various kinds of collection practices, such as garnishment of wages or attachment of property. In these cases, some kind of pre-collection process usually must be afforded, but the nature of that process can be very minimal.

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Regarding garnishment of wages, the Court held in *Sniadach v. Family Finance Corp.*\(^9\) that garnishment of even part of an individual’s wages was impermissible absent a prior hearing or an emergency situation which justified foregoing the hearing. The Court noted that “a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process.” Similarly, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*\(^9\) the Court held that garnishment of an individual’s property by a court clerk without notice or opportunity for an early hearing and without participation by a judge violated due process. However, Justice Powell noted in a concurrence, “In my view, procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security and by his establishment before a neutral officer of a factual basis of the need to resort to the remedy as a means of preventing removal or dissipation of assets required to satisfy the claim.” Chief Justice Burger, and Justices Rehnquist and Blackmun, dissented from even this limited requirement.

Regarding attaching a debtor’s property to satisfy a debt, the Court held in *Fuentes v. Shevin*\(^1\) that in a replevin suit between two private parties the initial determination of whether to authorize a writ allowing repossession of property required something more than an *ex parte* proceeding before a court clerk. Chief Justice Burger, and Justices White and Blackmun, dissented, with Justices Powell and Rehnquist not participating in the case. On the other hand, in *Mitchell v. W.T. Grant Co.*,\(^2\) a Louisiana sequestration statute permitted the seller-creditor holding a vendor's lien to secure a writ of sequestration *ex parte* and, having filed a bond, to cause the sheriff to take possession of the property at issue. The writ, however, was issuable only by a judge upon the filing of an affidavit clearly setting out the facts entitling the creditor to sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued. Justices Douglas, Brennan, Stewart, and Marshall dissented, and would have required more than an *ex parte* hearing, as in *Fuentes v. Shevin*. In a third case, *Connecticut v. Doehr*,\(^3\) the Court held that a state statute violated due process when it authorized prejudgment attachment of real estate without prior notice or hearing without a showing of exigent circumstances. The Court noted that in applying the *Mathews

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\(^9\) 419 U.S. 601, 606-07 (1975); *id.* at 611 (Powell, J., concurring in the judgment); *id.* at 614 (Blackmun, J., joined by Rehnquist, J., dissenting); *id.* at 620 (Burger, C.J., dissenting).

\(^1\) 407 U.S. 67, 81-83 (1972); *id.* at 102-03 (White, J., joined by Burger, C.J., and Blackmun, J., dissenting); *id.* at 97 (Powell & Rehnquist, JJ., did not participate in the case).

\(^2\) 416 U.S. 600, 617-20 (1974); *id.* at 630-36 (Stewart, joined by Douglas & Marshall, JJ., dissenting); *id.* at 636 (Brennan, J., dissenting).

balancing test in these cases, the interests of all three parties – the debtor, the creditor, and the government’s interest in a fair, but effective remedy for creditors – must all be part of the cost-benefit balancing test.

Related issues of due process arise in the context of the Internal Revenue Service using various collection measures regarding individuals’ tax obligations. Under the Internal Revenue Service Restructuring and Reform Act of 1998, taxpayers are granted the right to independent administrative and judicial review of Internal Revenue Service decisions to levy property or file a notice of a federal tax lien on property. In addition, sometimes the government seizes property in the context of a criminal investigation. The Court held in City of West Covina v. Perkins, that the Due Process Clause requires governmental entities to provide notice that property was seized, but does not require the government to provide specific instructions or advice to owners who seek the return of property lawfully seized, but no longer needed for police investigation or criminal prosecution, where such procedures are outlined in published, generally available state statutes and case law.

G. School Cases

Students are entitled to limited due process rights regarding disciplinary proceedings at public schools. For elementary and secondary schools, state statutes providing for compulsory attendance give the student a property interest in attendance. For college and universities, enrollment creates a contract right to attend, that contract right being a property interest. In Goss v. Lopez, the majority concluded that prior to a 10-day suspension, a student is entitled to oral or written notice of the charges, an explanation of the evidence against the student, and an opportunity to present the student’s side of the case. The majority noted that the hearing can be very informal, and no delay is needed between notice and the informal hearing. In dissent, Justice Powell, joined by Chief Justice Burger, and Justices Blackmun and Rehnquist, concluded in Goss that school suspensions of 10 days or less raised no due process issues requiring a constitutional remedy. Although not addressed in Goss, presumably some greater set of procedures would be required when dealing with longer disciplinary actions like a semester-long suspension, or dismissal from school.


Reflecting deference to schools, the Court held in *Ingraham v. Wright* that the availability of a tort action against school personnel who unreasonably inflict paddling on students was all the process due students who were paddled. Paddling has less severe consequences than suspension, where more process is due. In dissent, Justice White, joined by Justices Brennan, Marshall, and Stevens, concluded that the possibility of a tort action alone was not sufficient, and that the student should be allowed to present the student’s side of the story prior to paddling. Reflecting similar deference, the Court held in *Board of Curators of University of Missouri v. Horowitz* that very limited due process rights would attach to “academic” decisions, including academic dismissals, made by a school, rather than “disciplinary” decisions. While a 5-Justice majority seemed to hold that no due process rights attach at all to “academic” decisions, Justice Powell’s critical fifth vote in the case indicated that he joined the Court’s opinion “because I read it as upholding the District Court’s view that respondent was dismissed for academic deficiencies rather than for unsatisfactory personal conduct, and that in these circumstances she was accorded due process.”

Of course, all of these decisions only apply to public schools, for which the requisite “state action” exists to trigger a due process analysis. For private schools, any rights in disciplinary hearings would have to be created by state or federal statutory law, or through contract or tort doctrine.

**H. Rights of Detained Persons**

The limited due process rights of persons detained outside the regular criminal justice system, such as alleged terrorists captured after 9-11 (September 11, 2001), or enemy combatants held as a result of military action, are addressed at §§ 12.4.1, 12.4.2 & 12.4.3. As noted at § 12.4.1 nn.36-37, to the extent alleged terrorists, or enemy combatants, are granted rights similar to military personnel in court-martial proceedings under the Uniform Code of Military Justice, or are treated as captured prisoners of war under the Geneva Conventions, due process would likely be met. Limited due process right for aliens detained because of alleged violations of immigration laws are discussed at § 12.4.4. The Supreme Court has held that even resident aliens charged with being deportable from the United States may be detained “for the brief period necessary for their removal proceedings” without an individualized determination that the alien poses a danger to society or is a flight risk.

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98 430 U.S. 651, 682-83 (1977); id. at 693-700 (White, J., joined by Brennan, Marshall & Stevens, JJ., dissenting).

99 435 U.S. 78, 87-91 (1978); id. at 92-93 (Powell, J., concurring); id. at 96 (White, J., concurring in part and dissenting in the judgment) (“[w]hatever that minimum is [required], the procedures accorded her satisfied or exceeded that minimum”); id. at 96 (Marshall, J., concurring in part and dissenting in part) (minimum procedure met, but rejecting academic versus disciplinary distinction); id. at 108-09 (Blackmun, J., joined by Brennan, J., concurring in part and dissenting in part) (minimum procedures met, and no need to address academic versus disciplinary distinction).

I. Delegation of Government Functions to Private Parties

In *Texas Boll Weevil Eradication Foundation v. Lewellyn*, the Texas Supreme Court invalidated a statute that gave a private board of cotton-growers sweeping police powers to eradicate boll weevils, a crop pest. The board members, who were area farm owners, used their power against other area growers by forcing them to raze their fields to stop dubious outbreaks of the pestilence. The Texas Supreme Court found delegation to a private group to be much more troubling than delegations to state agencies or municipalities, stating, “[P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.” To guide this scrutiny, the court indicated that eight factors were of particular relevance. These were:

1. Are the private delegate’s actions subject to meaningful review by a state agency or other branch of the state government?
2. Are the persons affected by the private delegate’s actions adequately represented in the decisionmaking process?
3. Is the private delegate’s power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for task delegated?
8. Has the Legislature provided sufficient standards to guide the private delegate?

Similarly concerned with delegation of government power to private parties, the Second Circuit reviewed in *General Electric Co. v. New York Department of Labor* New York's "prevailing wage" law, because it allowed private parties to dictate the government's actions toward others without the usual political or judicial process. The court observed that "the Department's procedures seem not to involve the exercise of any [state agency] discretion in setting prevailing wage and supplement rates." In *Club Misty, Inc. v. Laski*, the Seventh Circuit considered a Chicago ordinance allowed a neighborhood referendum to control the granting or revocation of liquor licenses. The Court noted that while the legislature can empower voters to act legislatively, as in

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101 952 S.W.2d 454, 469-72 (Tex. 1997).
102 936 F.2d 1448, 1459 (2nd Cir. 1991).
103 208 F.3d 615, 622 (7th Cir. 2000).
a normal public referendum, provided that the action "is on the legislative side of the legislative/judicial divide," transferring to private parties judicial/adjudicative type decision-making, such as applying the law to the facts of individual liquor license cases, violates due process.

A similar problem would seem to exist if an attempt were made between a government agency and a private corporation or entity to contract out the work involved with the provision of government benefits or assistance, such as welfare eligibility determinations for those in poverty. Under the Club Misty analysis, privatized welfare eligibility determinations would appear to be on the judicial side, assessing the past and present individuals' situation. One author has concluded, "The privatization of welfare services via contract with private organizations is inherently fraught with unavoidable due process problems and overstepping of the nondelegation doctrine."104

J. Legislative Adoption of Rules Drafted by Private Parties

Related due process issues arise if law has developed around legislatures or agencies incorporating or enacting a code or set of rules borrowed in its entirety from some outside group. For example, in American Home Products Corp. v. Homsey,105 the Oklahoma Supreme Court indicated that if a legislative act "does confer such power on an unnamed, unofficial group, it is within the inhibition of the Constitution. It is also apparent that the act would be invalid if the agreement referred to were approved without investigation, or even if the agreement were considered as the sole evidence of the facts which the board is authorized to find, since no agreements of individuals could make facts exist which do not exist, so far as others and the public are concerned." Similarly, in Quality Oil Company v. E.I. du Pont de Nemours & Co.,106 the Kansas Supreme Court held that "The legislature is powerless to clothe a private person with power to fix minimum resale prices binding upon all who acquire and sell his trade-mark commodity with whom he has no direct contractual relation. An attempt to confer such power is an attempt to delegate legislative power, which is futile."

In practice, these limitations are not of much practical consequence, since if the legislature makes its own independent review of whatever material is presented to it by the private group, and then makes its own decision to adopt whatever standards the legislature deems fit, delegation problems disappear. In such circumstances, the statute is then a standard social or economic regulation, and merely tested under minimum rational review under an Equal Protection Clause analysis, addressed at § 19.1 nn.10-26, and Due Process Carolene Products analysis, addressed at § 17.3.


Rights review in Constitutional Courts around the world tend to use one basic approach: proportionality. Proportionality analysis has three basic steps: (1) suitability, which examines whether the government action is rationally related to a legitimate government interest; (2) necessity, which asks whether the government has used the least restrictive means to advance its goals, in order to ensure that the government does not burden the right more than is necessary for the government to achieve its goals; and (3) balancing “stricto sensu,” which asks whether the marginal benefit of the government regulation to advance the legitimate public interest is greater than the marginal burden on the individual. A preliminary fourth step, entitled “legitimacy,” is used by some courts. Under this step, the “judge confirms that the government is constitutionally-authorized to take such a measure” before continuing to apply the suitability, necessity, and balancing steps of the analysis. From an analytic perspective, this inquiry into “legitimacy” is best understood as part of the “suitability” inquiry into whether the government is rationally advancing a “legitimate” government interest, rather than viewed as an independent inquiry.

Despite surface differences between international proportionality review of the constitutionality of government action and American tier and reasonableness review, summarized at § 19.1 nn.26-43 (tier review, with three tiers of minimum rationality review, intermediate review, and strict scrutiny) & § 24.1 (“second-order” and “third-order” reasonableness review), each approach uses the same building blocks in developing the relevant standard of review. Each is based on a means/end analysis, focusing both on the ends the government is seeking to advance, and the means by which those ends are advanced. Each focuses on the extent to which the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate. Each is concerned with whether the government’s interests are strong enough to justify the burden on individual rights.

Under the first building block, one has to decide how strong the government end has to be to justify the regulation, and how well do the means have to be drafted to advance that end. Under the American doctrine of strict scrutiny, intermediate review, and minimum rationality review, summarized at §§ 19.1 & 20.1, there are three different answers to these questions. Under minimum rationality review, the government action – whether legislation, administrative regulation, or executive order – only has to be rationally related to advancing a legitimate government end, and the challenger bears the burden of proving it is not. In contrast, under intermediate review, the government has the burden to justify its action, and the government action must be substantially related to advancing an important or substantial government interest. At strict scrutiny, the government also has the burden to justify its action, and that action must be directly related to advancing a compelling or overriding governmental interest. The international inquiry into

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108 Id. at 75-76.

109 Id. at 75.
suitability tracks a rational review approach to this first building block by asking whether “the means chosen and the ends pursued is rational and appropriate, given a stated policy purpose.”\textsuperscript{110}

As with means/end reasoning, there are three different approaches under the American doctrines of strict scrutiny, intermediate review, and minimum rationality review to the second building block issue of whether the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate. Under strict scrutiny, the government action must be the least restrictive effective alternative to advance the government’s interest. Under intermediate review, the government action must only be not substantially more burdensome than necessary to advance the government’s interest, not the least burdensome alternative. Under minimum rationality review, the government action must only not impose an irrational burden on individuals. The international inquiry into “necessity” tracks the strict scrutiny version of the narrow tailoring inquiry. It asks specifically whether the government has used the least restrictive means to advance its goals, in order to ensure that the government does not burden the right more than is necessary for the government to achieve its goals.\textsuperscript{111} In practice, however, it has been noted that typically “judges do not invalidate a measure simply because they [the judges] can find one less restrictive alternative. Instead, most courts, explicitly or implicitly, insist that policymakers have a duty to consider reasonably available alternatives and to refrain from selecting the most restrictive among them.”\textsuperscript{112} Depending on how it is applied in practice, a proportionality analysis that focused on a duty to “refrain from selecting the most restrictive” alternative would appear to allow the government to adopt a more restrictive alternative than necessary, as long as it was not the most restrictive among available alternatives. In practice, this might be similar to requiring the government not to adopt an alternative substantially more burdensome than other effective alternatives, and thus track the American intermediate review standard of narrow tailoring.

With regard to the third building block of justifying the burden on individual rights, under proportionality analysis “the court weighs, in light of the facts, the benefits of the act (already found to have been narrowly tailored) against the costs incurred by infringement of the right, in order to decide which side shall prevail.”\textsuperscript{113} If done with rigor, the analysis focuses on whether the marginal benefit of the regulation to advance the legitimate public interest is greater than the marginal burden on the individual. In practice, many courts are not that rigorous, and approach the question from the perspective of merely ensuring that “no factor of significance to either side has been overlooked.”\textsuperscript{114}

\textsuperscript{110} Id. at 75.


\textsuperscript{112} Id.

\textsuperscript{113} Id. at 803.

\textsuperscript{114} Id. With regard to the burden of proof on the validity of the law, under international law, the burden always is on the government to justify its action. Id. For further discussion of the
While the three “tier” standards of review are clearly used in Supreme Court doctrine, two additional levels of review between intermediate review and strict scrutiny have been used. As noted at § 9.2, Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volume 3: The First Amendment (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials), while generally applying intermediate review to analyze commercial speech regulations, the Court uses the “directly related” language of strict scrutiny under Central Hudson Gas & Electric Corp. v. Public Service Comm’n.115 Because it adds one strict scrutiny component (direct relationship) to an otherwise intermediate test, this level of review can be called “intermediate review with bite.”

The second addition level uses the strict scrutiny requirement of a “compelling government interest” and “direct relationship,” but adopts the intermediate review requirement that the government not adopt an alternative “substantially more burdensome than necessary,” not the strict scrutiny “least burdensome effective alternative” requirement. A recent use of this “loose strict scrutiny” standard of review occurred in the racial redistricting case of Bush v. Vera,117 discussed at § 21.4 nn.79-80, and in dissent by four Justices in race-based affirmative action cases, as discussed at § 21.3 n.72.

This development of “intermediate review with bite” and “loose strict scrutiny” is a good thing for purposes of predictable and principled application of the law regarding standards of review. The addition of intermediate review with bite and loose strict scrutiny creates four clearly defined levels of heightened scrutiny, each one more rigorous than the preceding standard of review on only one element of the three-pronged standard of review balancing test. Thus, there is basic intermediate review (with all three elements of the standard of review reflecting an intermediate approach toward the governmental interests, benefits, and burden inquiries); intermediate review with bite (two elements intermediate, the benefit element strict scrutiny); loose strict scrutiny (two elements strict scrutiny, only the burden inquiry intermediate); and traditional strict scrutiny (all three elements strict). These levels of scrutiny provide a step-ladder approach toward standards of review, with each higher level of scrutiny clearly more rigorous than the preceding level.

Taken together, this discussion has suggested there are seven different balancing tests used by the Supreme Court in various cases. These seven tests can be organized in terms of the level of rigor required for the governmental action to be constitutional. At one extreme is the minimum rational standard of proportionality, see R. Randall Kelso, United States Standards of Review versus the International Standard of Proportionality: Convergence and Symmetry, 39 Ohio Northern U.L. Rev. 455 (2013) ; R. Randall Kelso, Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World, 29 Quinnipiac L. Rev. 433 (2011).


review balancing test. Slightly more rigorous than this test are the two “reasonableness” balancing constitutional tests. These tests are more burdensome on the government than minimum rational review because even if the governmental action is rationally related to advancing a legitimate governmental end and does not impose an irrational burden on individuals, if the burden is too great and the benefit is too small, the governmental action will still fail the factor balancing test because the burden will be “clearly excessive,” as under Dormant Commerce Clause review, or not “reasonable and necessary,” as under Contracts Clause review, or not “roughly proportionate,” as under Takings Clause review, or some other phrasing of not being “reasonable,” as discussed at §§ 24.1 & 24.3. In applying such “reasonableness” balancing tests, the Court does not give the same kind of “substantial deference” to legislative judgments that the Court gives at minimum rational review, discussed at § 19.1 n.26. However, that does not mean that the Court gives no deference at all. Despite the Court determining for itself whether the underlying policies are actually supported by fact, some deference to governmental judgment is still given, as discussed at § 25.4.4 nn.52-54.118

Because the two factor balancing tests permit resort to legitimate governmental interests, they are best understood as versions of rational review. Where the burden is on the challenger to prove the unconstitutionality of the governmental action, similar to the burden under minimum rational review, that can be called, as it was at § 24.1, “second-order” reasonableness review. Where the burden shifts to the government to justify the constitutionality of its action, that can be called, as it was at § 24.1, “third-order” reasonableness review.

The four kinds of heightened scrutiny tests of intermediate review, intermediate review with bite, loose strict scrutiny, and strict scrutiny all involve cases where the government has the burden of proving the constitutionality of its action. They all require more than mere legitimate interests to support the governmental action. Thus, they are all more rigorous than any of the three versions of rational review: minimum rational review, “second-order” reasonableness balancing, and “third-order” reasonableness balancing. In sum, there are thus seven different balancing tests that the Court applies in various cases.

Under American constitutional doctrine, for reasonableness balancing analysis, it would be appropriate if the Supreme Court were to phrase more clearly all the reasonableness balancing tests as the same kind of review, with only the variation, discussed herein, that sometimes the burden is

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118 In addition to cases cited at § 25.4.4 nn.52-54, see also District of Columbia v. Heller, 554 U.S. 570, 690 (Breyer, J., joined by Stevens, Souter & Ginsburg, dissenting) (“In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. See Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195-196 (1997); see also Nixon [v. Shrink Missouri Government PAC, 528 U.S. 377], 403 [(2000)] (Breyer, J., concurring). Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its 'independent judicial judgment’ in light of the whole record to determine whether a law exceeds constitutional boundaries. Randall v. Sorrell, 548 U.S. 230, 249 (2006) (opinion of Breyer, J.) (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984)).”).
on the challenger to prove unreasonableness and sometimes the burden is on the government to prove reasonableness. That would reduce to 2 standards of review (“second-order” and “third-order” reasonableness review) the multiple differently stated standards of review which are currently stated for Dormant Commerce Clause analysis; the Contracts Clause; the Takings Clause; constitutionality of punitive damages in tort actions under BMW v. Gore; less than substantial burdens on unenumerated fundamental rights, such as under the right to vote, right of privacy, right to travel, and right of access to courts; the Mathews v. Eldridge test under procedural due process cases; and other such cases. Such a more deductive, analytic approach to the standard applied in these cases would better track the logical, deductive approach of civil law countries.

There appears to be some movement in America to get rid of the tests denominated above as intermediate with bite and loose strict scrutiny, and to rephrase the commercial speech doctrine, currently the Central Hudson Gas test, and racial redistricting cases, currently Bush v. Vera, as strict scrutiny cases. That would get the American system down to the 3 basic tiers of review (minimum rationality review, intermediate review, and strict scrutiny) and 2 reasonableness tests (burden on challenger in one; burden on the government in the other). On the other hand, there is some benefit in having intermediate with bite and loose strict scrutiny, as they are logically consistent stepping stones in the level of review between intermediate review and strict scrutiny, and one can agree with the current approach that because commercial speech is “more hearty” it does not need strict scrutiny protection, and that state governments should be given greater than strict scrutiny flexibility in making their political redistricting decisions.

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120 See, e.g., Thompson v. Western States Medical Center, 535 U.S. 357, 377 (2002) (Thomas, J., concurring), citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 523 (1996) (Thomas, J., concurring in part and concurring in the judgment) (Central Hudson test should not be used, and thus regular content-based strict scrutiny analysis would apply); Bush v. Vera, 517 U.S. 952, 999-1003 (1996) (Thomas, J., joined by Scalia, J., concurring in the judgment) (reaffirming the principle that all racial classifications should be governed by strict scrutiny, even in Bush).

121 See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (“commercial speech may be more durable than other kinds.”).

For proportionality analysis, based on the above discussion, there are four possible alternatives given the two kinds of “narrow tailoring” and two kinds of “stricto sensu” balancing discussed at § 28.4 nn.111-14. The four approaches are: (1) loose narrow tailoring and loose balancing; (2) loose narrow tailoring and strict balancing; (3) strict narrow tailoring and loose balancing; (4) strict narrow tailoring and strict balancing. To modify proportionality analysis to reflect these four approaches would require developing a theory to justify when looser or stricter narrow tailoring and “stricto sensu” balancing should be used. In addition, many countries, with Constitutions written since 1945, have similar kinds of economic and social rights, and thus do not have the same split as in American doctrine between economic and social rights.123 This suggests even less of a reason for international courts to adopt different versions of proportionality analysis.

Given the seven levels of review in American doctrine, perhaps the best approach for one consistent proportionality analysis would be to adopt an approach in the middle of the American standards of review. This would adopt the looser or intermediate review form of “narrow tailoring” analysis, but the stricter “marginal benefit is greater than marginal burden” approach for “stricto sensu” balancing. A rigorous strict scrutiny kind of least restrictive alternative test is perhaps too restrictive on needed government discretion in many cases. It is really true that it makes sense for courts to scrutinize government decisionmaking by requiring the government to prove in every case that the government used the absolutely least burdensome effective alternative. In contrast, requiring the government not to adopt an approach substantially more burdensome then necessary, and thus not on the end of being the most burdensome kind of regulation, seems a more appropriate standard for one uniform standard in every case. Once the government has done this, the government should then have to show the benefits of the regulation outweigh the burdens. This kind of proportionality analysis would thus be more rigorous than “third-order” American reasonableness review (since it would have an intermediate narrow tailoring component), but less vigorous than American intermediate review (since would have “third-order” reasonableness balancing, not a requirement that the government be advancing not merely legitimate, but important or substantial interests).124


124 Such an approach would provide greater structure to current international proportionality analysis, which would be beneficial. See generally Stefan Sottiaux & Gerhard van der Schyff, Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights, 31 Hastings Int’l & Comp. L. Rev. 115, 115-17 (2008). But this approach rejects any view that “stricto sensu” balancing should not be part of the proportionality test. See generally Georg Nolte, Thin or Thick? The Principle of Proportionality and International Humanitarian Law, 4 Law & Ethics Hum. Rts. 243, 248-49 (2010), citing Bodo Pieroth & Bernhard Schlink, Grundrechte paras. 289 ff.(24th ed. 2008) (arguing that “stricto sensu” balancing should not be part of proportionality analysis because, it is alleged, it places the judge more in the role of a legislator balancing public policy, rather than in the role of a judge).
These seven balancing tests – the “base” of minimum rational review, “plus six” other standards of heightened review – are summarized in Table 10 below.

### Table 10

**Levels of Review of Government Action: The “Base Plus Six” Model of Review**

<table>
<thead>
<tr>
<th>Level of Scrutiny</th>
<th>Gov’t Ends to be Advanced</th>
<th>Statutory Means to Ends Relationship</th>
<th>Typical Areas Where Used</th>
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<tbody>
<tr>
<td><strong>&quot;Base&quot; Minimum Rational Review</strong></td>
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<tr>
<td>Minimum Rational Review: Burden on</td>
<td>Legitimate</td>
<td>Rational</td>
<td>Standard Social or Economic</td>
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<tr>
<td>challenger to prove unconstitutionality</td>
<td>(substantial)</td>
<td>(substantial)</td>
<td>Regulation: <em>Carolene Products</em>; <em>Railway Express</em></td>
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<td>to government</td>
<td>to government</td>
<td>Aliens: Illegal, Job Part of</td>
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<td></td>
<td>[Does government have “rational basis” for action]</td>
<td></td>
<td>Democracy, Federal Regulation</td>
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<td></td>
<td></td>
<td></td>
<td>Contract Clause: <em>Energy Reserves</em></td>
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<tr>
<td>The &quot;Plus Six&quot; Standards of Increased Scrutiny</td>
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<td></td>
</tr>
<tr>
<td>Basic Rational or Second-Order Review:</td>
<td>Legitimate Ends “Not Unreasonable” Given Means</td>
<td>Dormant Commerce Clause: <em>Pike</em></td>
<td></td>
</tr>
<tr>
<td>challenger to prove unconstitutionality</td>
<td>(no substantial)</td>
<td>(no substantial)</td>
<td>Contract Clause: <em>U.S.Trust/Spannaus</em></td>
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<td></td>
<td>to government</td>
<td>to government</td>
<td>Takings Clause: <em>Penn Central</em></td>
</tr>
<tr>
<td></td>
<td>[Balance government interests and availability of less burdensome alternatives v. burden on persons; some deference to gov’t: see text page 1210]</td>
<td>Punitive Damages: <em>BMW v. Gore</em></td>
<td></td>
</tr>
<tr>
<td>Rational Review with Bite or Third-Order Review:</td>
<td>Same as Second-Order Review, except the burden shifts to the government to justify its action. Burden remains on government for all higher review levels</td>
<td>Dormant Commerce Clause: <em>Maine v. Taylor</em></td>
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<td>Takings Clause: <em>Dolan v. Tigard</em></td>
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<tr>
<td><strong>Intermediate Review Standards</strong></td>
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<tr>
<td>Intermediate Review</td>
<td>Substantial/ Important/ Significant</td>
<td>Substantially Related</td>
<td>Gender Discrimination</td>
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<td></td>
<td>Not Substantially Related</td>
<td>More Burdensome Than Necessary</td>
<td><em>Alien Children: Plyler v. Doe</em></td>
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<td>Art. IV, § 2 Priv. &amp; Imm. Clause</td>
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<tr>
<td>Intermediate Review with Bite</td>
<td>Substantial/ Important/ Significant</td>
<td>Directly Related</td>
<td>Commercial Speech: <em>Central Hudson Gas</em></td>
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<tr>
<td></td>
<td>Not Substantially Related</td>
<td>More Burdensome Than Necessary</td>
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<tr>
<td><strong>Strict Scrutiny Standards</strong></td>
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<tr>
<td>Loose Strict Scrutiny</td>
<td>Compelling</td>
<td>Directly Related</td>
<td>Racial Redistricting: <em>Bush v. Vera</em></td>
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<td></td>
<td>Not Substantially Related</td>
<td>More Burdensome Than Necessary</td>
<td></td>
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<tr>
<td>Strict Scrutiny</td>
<td>Compelling</td>
<td>Directly Related</td>
<td>Race, Ethnicity, National Origin</td>
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<td></td>
<td>Least Restrictive Effective Alternative</td>
<td>Aliens: State Regulation of Lawful</td>
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<td>Aliens Not Involving Democracy</td>
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<td>Substantial Burden on</td>
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<td></td>
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<td>Unenumerated Fundamental Right</td>
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Of course, in addition to these levels of scrutiny, sometimes individual rights doctrine is phrased in terms of a categorical rule. For example, Congress can never pass a bill of attainder, addressed at § 16.2.2, or pass an ex post facto law, addressed at § 16.2.3. Conviction of treason always requires at least two witnesses to the same overt act, addressed at § 16.2.4. Under Fifth Amendment Takings Clause, any physical occupation of an individual’s property is a taking, no matter how small, addressed at § 18.3.2. Under the Tenth Amendment, any “commandeering” of a state’s legislature, executive official, or administrative agency by the federal government is unlawful, no matter how small the “commandeering,” addressed at § 8.1.2. The Thirteenth Amendment provides a categorical ban on “slavery or involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted,” addressed at § 16.4.2.

For many constitutional criminal defendant’s rights, there are also categorical barriers. For example, under the Fifth Amendment persons accused of crimes cannot be put in double jeopardy or have their privilege against self-incrimination rights violated. Sixth Amendment rights to trial by an impartial jury, right to confront witnesses under the Confrontation Clause, or compulsory process for obtaining witnesses in defense, and Eighth Amendment rights that excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment inflicted, are phrased as absolute categorical barriers.

Of course, one might view the Eighth Amendment ban on “excessive” bail, or “excessive” fines, or “cruel and unusual” punishment as a variation of “third-order” reasonableness review, with the government bearing the burden on establishing that the bail, fine, or punishment is not “excessive” or “cruel and unusual.” Similarly, the Fourth Amendment right to be protected from “unreasonable search and seizures” might also be viewed as a “third-order” reasonableness test, as the government bears the burden of showing any “search or seizure” is “reasonable.” All these criminal defendant’s rights doctrine are typically addressed in a separate Criminal Procedure course.

With respect to the remaining Bill of Rights provisions, under the First Amendment the Court will use in various contexts different standards of review, from minimum rationality review through strict scrutiny, and an occasional absolute categorical ban, as addressed at § 1.1.1 & § 1.4.2, Table 4 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3: THE FIRST AMENDMENT (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials). For the Second Amendment, the Court has not yet provided exact guidance on an approach, but presumably it will be strict scrutiny for substantial burdens on Second Amendment rights, and either some form of “reasonableness review” or “intermediate review” for less than substantial burdens, as suggested by recent lower federal and states court cases cited in this Coursebook at § 16.3.1 nn.27-28. While the Court has considered no cases under the Third Amendment, as noted at § 16.3.2, presumably its language that “[n]o 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” reflects a categorical rule. The Seventh Amendment preservation of the right to trial by jury at common law, addressed at § 16.3.4, is also a categorical rule. Finally, as discussed at § 25.1 nn.3-4, and mentioned in Justice Goldberg’s concurrence in Griswold v. Connecticut, excerpted at § 25.4.4, the Ninth Amendment has never been used as a source of substantive protection itself, but has been used to justify the Court’s unenumerated fundamental rights analysis addressed in Chapters 24-27.